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In the Supreme Court of the United States

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

PADUNGSRI PHINPATHYA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

ELLIOTT SCHULDER
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether an alien's absence from the United States may be considered meaningfully interruptive of his "continuous physical presence" in this country, for the purpose of determining eligibility for suspension of deportation pursuant to 8 U.S.C. 1254(a)(1), if the hardships associated with the alien's deportation would be as severe if the absence had not occurred.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–13a) is reported at 673 F.2d 1013. The decision of the Board of Immigration Appeals (App. B, *infra*, 14a–21a) is not reported. The decision of the immigration judge (App. C, *infra*, 22a–31a) is also not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1981. A petition for rehearing was denied on April 5, 1982 (App. D, *infra*, 32a). Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including July 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

8 U.S.C. 1254(a)(1) provides:

> As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—
>
> (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence * * *.

STATEMENT

Respondent is a native and citizen of Thailand who first entered the United States as a nonimmigrant student in October 1969. Respondent's husband, also a native and citizen of Thailand, entered this country in August 1968. Both respondent and her husband were

authorized to remain until July 25, 1971, but they remained beyond that date without securing the permission of the immigration authorities (App. A, *infra*, 1a).

In January 1977, the Immigration and Naturalization Service charged respondent and her husband with deportability under Section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2), as nonimmigrants who had remained in this country beyond the time authorized in their visas. At the deportation hearing, both respondent and her husband conceded deportability and applied for suspension of deportation pursuant to Section 244(a)(1) of the Act, 8 U.S.C. 1254(a)(1) (App. A, *infra*, 2a). That section authorizes the Attorney General, in his discretion, to suspend deportation of a deportable alien. In order to be eligible for this discretionary relief, an alien must show that (1) he has been physically present in the United States for a continuous period of at least seven years immediately preceding the application for suspension of deportation; (2) he has been a person of good moral character during that seven-year period; and (3) deportation would result in extreme hardship to the alien or to his spouse, parent or child who is a United States citizen or lawful permanent resident.

The immigration judge granted suspension of deportation as to respondent's husband, but found respondent ineligible for suspension on the ground that she had failed to meet the seven year "continuous physical presence" requirement of the statute (App. C, *infra*, 22a–31a). The evidence before the immigration judge showed that respondent had been absent from this country for a period of approximately three months, from January 1974 to April 18, 1974, when she traveled with her two children to visit her mother in Thailand

(*id.* at 28a; R. 78).[1] About one month prior to her departure, respondent obtained a new Thai passport; however, respondent did not have a nonimmigrant visa allowing her to reenter this country when she departed for Thailand. Accordingly, after her arrival in Thailand, respondent went to the United States Consul and obtained a nonimmigrant visa as the wife of a foreign student in the United States. Although respondent was aware that her husband's student visa had expired more than two years earlier, in 1971, she failed to inform the consular officer of that fact (App. C, *infra*, 28a; R. 83–87).

On the basis of this evidence, the immigration judge concluded that respondent's absence from the United States was neither brief, innocent, nor casual (App. C, *infra*, 28a):

> The absence would have been longer than three months if she had not obtained the spouse of a student visa as fast as she did obtain it. It was not casual because she had to obtain a new Thai[ ] passport, as well as a nonimmigrant visa from the American Consul, to return to the United States. It was not innocent because she failed to inform the American Consul that she was the wife of a student who had been out of status for three years (and therefore not entitled to the nonimmigrant visa she received). * * *

Accordingly, the judge concluded that respondent's departure was meaningfully interruptive of her continuous physical presence in the United States and that she

[1] "R." refers to the certified administrative record.

was ineligible for suspension of deportation (*id.* at 28a–29a).[2]

The Board of Immigration Appeals affirmed the immigration judge's decision on the continuous physical presence issue (App. B, *infra*, 14a–21a).[3] The Board observed that when respondent traveled to Thailand in January 1974, "she had already remained beyond the time authorized * * * [and] was only able to obtain a visa to return by misrepresenting her status as the spouse of a student, knowing full-well that she had no right to claim that status" (*id.* at 17a). Because respondent's departure substantially increased the likelihood that her illegal status would be discovered and that she would either be excluded or deported once her true status was ascertained, the BIA concluded that respondent's departure was a significant interruption of her physical presence in the United States (*id.* at 17a–18a).

The court of appeals reversed (App. A, *infra*, 1a–13a). Relying on its decision in *Kamheangpatiyooth* v. *INS*, 597 F.2d 1253 (9th Cir. 1979), the court con-

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[2]The immigration judge rejected the contention of the INS that respondent was barred from establishing her good moral character on the ground that she had given false testimony for the purpose of obtaining a benefit under the Immigration and Nationality Act. See 8 U.S.C. 1101(f)(6) (App. C, *infra*, 26a–27a). In addition, the judge found that respondent's daughter, who is a United States citizen, would suffer extreme hardship if respondent and her husband were deported (*id.* at 24a–26a).

[3]The Board reversed the immigration judge's decision with regard to the good moral character issue, finding that respondent gave false testimony at her deportation hearing (App. B, *infra*, 18a–19a). The Board also reversed the immigration judge's conclusion that respondent's husband was eligible for suspension of deportation, ruling that he had failed to establish extreme hardship either to himself or to his epileptic daughter (*id.* at 19a–21a).

cluded that the Board of Immigration Appeals had applied an erroneous legal standard in reaching its determination that respondent failed to meet the "continuous physical presence" requirement of Section 244(a)(1) of the Act (App. A, *infra*, 8a).[4]

In *Kamheangpatiyooth*, the court reaffirmed its earlier ruling in *Wadman* v. *INS*, 329 F.2d 812 (9th Cir. 1964), that the principles established by this Court in *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963), to decide whether a departure by a lawful resident alien was "intended" within the meaning of 8 U.S.C. 1101(a)(13) "should also guide the determination * * * whether an intervening absence interrupts the continuity of physical presence for purposes of [8 U.S.C. 1254(a)(1)]." 597

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[4]The court of appeals also overturned the BIA's determinations that respondent was not of good moral character and that respondent's husband did not prove that extreme hardship would result from deportation. On the good moral character issue, the court held that respondent's false statement on her application for suspension of deportation did not constitute false "testimony" within the meaning of 8 U.S.C. 1101(f)(6) and 1254(a)(1) (App. A, *infra*, 9a–11a). On the extreme hardship issue, the court held that the BIA abused its discretion in failing explicitly to consider the adverse effects of "the mere removal, and uprooting of [respondent's] epileptic child" from the United States (*id.* at 4a–5a).

We believe that both of these rulings are incorrect. The court's discussion of extreme hardship, in particular, demonstrates the Ninth Circuit's continued inability or unwillingness to follow this Court's directive in *INS* v. *Jong Ha Wang*, 450 U.S. 139 (1981), that the Attorney General's "construction and application of [the extreme hardship] standard should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute." *Id.* at 144. See, *e.g.*, *Prapavat* v. *INS*, 662 F.2d 561 (9th Cir. 1981); *Mejia-Carrillo* v. *INS*, 656 F.2d 520 (9th Cir. 1981); *Perez* v. *INS*, 643 F.2d 640 (9th Cir. 1981). At some point it may become necessary to ask this Court to review the Ninth Circuit's routine practice, despite *Wang*, of substituting its judgment for that of the BIA in suspension of deportation cases.

F.2d at 1256. Although this Court in *Fleuti* had pointed to several factors, including the duration of the alien's absence, the purpose of the visit and whether travel documents were obtained, as being relevant in determining whether a departure was meaningfully interruptive of an alien's permanent residence (374 U.S. at 462), the court in *Kamheangpatiyooth* concluded that "these factors are only evidentiary on the issue under section 244(a)(1) of whether an absence reduced the significance of the whole seven-year period as reflective of the hardship and unexpectedness of exposure to expulsion." 597 F.2d at 1257 (footnote omitted). In the court of appeals' view *(ibid.)*:

> An absence cannot be significant or meaningfully interruptive of the whole period if indications are that the hardship of deportation to the alien would be equally severe had the absence not occurred, and that no significant increase in the likelihood of deportation could reasonably have been expected to flow from the manner and circumstances surrounding the absence.

In the instant case, the court of appeals held that the BIA erred in concluding that respondent's departure was meaningfully interruptive merely because she thereby increased the risk of deportation (App. A, *infra*, 7a–8a).[5] Instead, the court concluded that under the *Kamheangpatiyooth* test, a departure that increases an alien's risk of deportation cannot be meaningfully interruptive unless it also reduces the severity of the hardships that would result from deportation; moreover, according to the court, even if both factors are present, it does not necessarily follow that the

[5] In so holding, the court of appeals stated (App. A, *infra*, 1a–2a, 6a) that respondent's three month trip to Thailand in 1974 was for the purpose of visiting her sick mother. However, there is no evidence in the record of the administrative proceeding that respondent's mother was ill at the time of respondent's trip, much less that the illness occasioned respondent's visit to Thailand.

departure must be regarded as having meaningfully interrupted the alien's continuous physical presence in the United States (App. A, *infra*, 8a).

REASONS FOR GRANTING THE PETITION

This case presents an important and recurring question of immigration law concerning the proper standard for determining whether a deportable alien has satisfied one of the eligibility requirements for the exceptional remedy of suspension of deportation pursuant to Section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1254(a)(1). The court below held that the seven year "continuous physical presence" requirement of Section 244(a)(1) is satisfied in the case of an alien whose illegal overstay in this country is interrupted by a three month trip abroad and who misrepresents her status in order to secure reentry into the United States. It is our submission that Congress could not conceivably have intended this result.

The court below achieved this result, moreover, by application of a test that finds no support in the language, structure or history of the Act, all of which suggest that Congress intended that the "continuous physical presence" requirement be given a narrow construction. Although the courts of appeals have recognized an exception to the "continuous physical presence" requirement in the case of an alien whose absence is not "meaningfully interruptive" of his physical presence in this country under the test established in *Rosenberg* v. *Fleuti*, *supra*, the decision below effectively erodes that test by concluding that a departure cannot be meaningfully interruptive if it does not reduce the hardships that would flow from the alien's deportation. No other court has construed the *Fleuti* test in this manner.

The court of appeals' decision will frustrate the government's efforts to deport aliens, such as respondent,

who have repeatedly flouted the Nation's immigration laws. Furthermore, because the decision below seriously undermines this Court's *Fleuti* test, the decision will have substantial repercussions beyond the suspension of deportation context. If a lengthy departure such as respondent's is not meaningfully interruptive of an alien's continuous physical presence for purposes of determining eligibility for suspension of deportation, then a similar departure presumably would not be regarded as a meaningful interruption of an alien's lawful residence for purposes of determining, under 8 U.S.C. 1101(a)(13), whether a lawful resident alien had attempted or made an "entry" that would subject him to exclusion or deportation under the immigration laws. We submit that review by this Court is warranted to correct the manifest error of the court of appeals.

1. The court of appeals in this case, relying on its earlier decision in *Kamheangpatiyooth* v. *INS*, *supra*, has concluded that an alien's absence from the United States during the seven year period immediately preceding his application for suspension of deportation cannot be regarded as breaking the continuity of the alien's physical presence in this country unless the hardships of deportation are made less severe as a result of the absence (App. A, *infra*, 8a). This construction of the statute unjustifiably commingles two separate statutory elements, "extreme hardship" and "continuous physical presence." Nothing in the language or history of the Act supports this strained interpretation. As Justice Clark remarked in his dissent in *Rosenberg* v. *Fleuti*, *supra*, 374 U.S. at 463 (emphasis in original), "'statutory construction' means * * * that the Court can *construe* statutes but not that it can *construct* them. The latter function is reserved to the Congress * * *." It is apparent that the court of appeals failed to heed this admonition.

The decision below, like that in *Kamheangpatiyooth*, is based on the erroneous assumption that Congress intended Section 244(a)(1) "to be generously construed." 597 F.2d at 1256. Our reading of the language, structure and history of the statute points in precisely the opposite direction.

In Section 244(a)(1) Congress provided that an alien applying for the extraordinary relief of suspension of deportation must have been "physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application * * *." 8 U.S.C. 1254(a)(1). The language of the statute reflects a congressional intent that the "continuous physical presence" requirement be read narrowly. On its face, the statute "contains no exception to the requirement of seven years of 'continuous physical presence' in the United States to be eligible for suspension of deportation." *McColvin* v. *INS*, 648 F.2d 935, 937 (4th Cir. 1981). Moreover, in *Jay* v. *Boyd*, 351 U.S. 345, 357 (1956), this Court rejected the suggestion that it should resolve all doubts in favor of the applicant in construing the suspension of deportation statute; instead, the Court stated, "we must adopt the plain meaning of a statute, however severe the consequences." More recently, in *INS* v. *Jong Ha Wang*, 450 U.S. 139, 145 (1981), this Court observed that a narrow interpretation of the term "extreme hardship" in Section 244(a)(1) "is consistent with the 'extreme hardship' language, which itself indicates the exceptional nature of the suspension remedy."

In addition, comparison of Section 244(a)(1) with other contemporaneously enacted provisions of the Immigration and Nationality Act reinforces the view that Congress intended the "continuous physical presence" requirement in Section 244(a)(1) to be construed strictly. Thus, former Section 301(b) of the Act, 8 U.S.C. 1401(b), provided that certain individuals shall lose

their status as United States nationals and citizens unless they "come to the United States and [are] continuously physically present there for a period of not less than two years" between 14 and 28 years of age. Section 301(b) further provided that "[i]n the administration of this subsection absence from the United States of less than sixty days in the aggregate during the period for which continuous physical presence in the United States is required shall not break the continuity of such physical presence." The failure to include a similar provision in Section 244(a)(1) suggests that Congress meant the "continuous physical presence" requirement of that section to be given a narrow, if not a literal, interpretation.[6] See *Fedorenko* v. *United States*, 449 U.S. 490, 512 (1981).

The legislative history of Section 244(a)(1) also reflects Congress' intention that the "continuous physical presence" requirement "be applied in a rigorous manner." *McColvin* v. *INS*, *supra*, 648 F.2d at 938. The predecessor to Section 244(a)(1) was enacted in 1948 and required only that an alien have "resided continuously in the United States for seven years or more" and show good moral character for the preceding five years. Act of July 1, 1948, Pub. L. No. 863, 62 Stat. 1206. In its 1950 review of the Nation's immigration laws, the Senate Committee on the Judiciary noted that INS field officers had "criticized the administrative interpretation of the 7-year residence provision of the law. These provisions have been held applicable to an alien who has a total of 7 years' residence in the United States, although the alien has been out of the United States for as long as 2 years during the last 7 years." S. Rep. No.

[6] Similarly, Section 316 of the Act, 8 U.S.C. 1427, which establishes a five year continuous "residence" requirement for admission to citizenship as well as a separate requirement of "physical presence" totalling at least half of the period of residence, underscores the distinction in the Act between residence and physical presence.

1515, 81st Cong., 2d Sess. 602 (1950). Two years later, "in an attempt to discontinue lax practices and discourage abuses" (H.R. Rep. No. 1365, 82d Cong., 2d Sess. 31 (1952)), Congress amended the suspension of deportation statute to require seven years' continuous *physical presence* in the United States.[7] It thus is apparent that Congress intended the "continuous physical presence" requirement to be strictly construed. The court of appeals' overly generous interpretation of the statute is directly contrary to this intent.

2. Until the Ninth Circuit's decision in 1964 in *Wadman* v. *INS*, *supra*, the lower courts and the Board of Immigration Appeals generally applied a strict, literal interpretation of the "continuous physical presence" language in Section 244(a)(1) and held ineligible for suspension of deportation any alien who was absent from the United States during the seven year period, without regard to the circumstances surrounding the absence. See, *e.g.*, *Arellano-Flores* v. *Hoy*, 262 F.2d 667, 668 (9th Cir. 1958); *United States ex rel. Bruno* v. *Sweet*, 133 F. Supp. 3, 6–7 (W.D. Mo. 1955), aff'd, 235 F.2d 801 (8th Cir. 1956); *Matter of Jacobson*, 10 I. & N. Dec. 782 (B.I.A. 1964); *Matter of Wong*, 10 I. & N. Dec. 513 (B.I.A. 1964). But see *McLeod* v. *Peterson*, 283 F.2d 180, 185–187 (3d Cir. 1960). In *Wadman*, however, the court held that the standards of *Rosenberg* v. *Fleuti*, *supra*, should be applied to determine whether an alien's trip outside the United States was a sufficiently significant event as to break the continuity of the alien's physical presence in the United States.

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[7] The 1952 Act also required an alien to show "exceptional and extremely unusual hardship" in order to qualify for suspension of deportation. 8 U.S.C. (1952 ed.) 1254(a)(1). Although this provision was subsequently amended to require that the alien show that deportation would result in "extreme hardship" (Act of Oct. 24, 1962, Pub. L. No. 87–885, Section 4, 76 Stat. 1248), the "continuous physical presence" requirement remained unchanged.

This Court in *Fleuti* had construed the term "intent" in the exception to the definition of "entry" in 8 U.S.C. 1101(a)(13) for unintended departures by lawful resident aliens "as meaning an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence." 374 U.S. at 462. The Court refused to hold that a lawful resident alien like Fleuti is subject "to exclusion for a condition for which he could not have been deported had he remained in the country" merely because he "steps across a border and, in effect, steps right back * * *." *Id.* at 460. In light of Congress' unquestioned ameliorative intent in creating an exception to the strict "entry" doctrine, the Court concluded that "an innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been 'intended' as a departure disruptive of his resident alien status * * *." *Id.* at 462. The Court noted that among the factors to be considered in determining whether a departure was "meaningfully interruptive" are the duration of the alien's absence, the purpose of the trip and whether the alien had to procure travel documents in order to make the trip.

The Ninth Circuit in *Wadman* concluded that "the term 'continuous' is no more subject to a hard and fast construction than is the term 'intended.' The question is whether the interruption, viewed in balance with its consequences, can be said to have been a significant one under the guides laid down in Fleuti." 329 F.2d at 816. Following the decision in *Wadman*, the courts of appeals and the BIA began to apply the *Fleuti* standards in determining whether an alien's trip abroad broke the continuity of his physical presence in the United States for purposes of Section 244(a)(1). See, *e.g.*, *Toon-Ming Wong* v. *INS*, 363 F.2d 234, 235–236 (9th Cir. 1966); *Barragan-Sanchez* v. *Rosenberg*, 471 F.2d 758, 760–761 (9th Cir. 1972); *Heitland* v. *INS*, 551 F.2d 495, 500–504 (2d Cir.), cert. denied, 434 U.S. 819

(1977); *Mamanee* v. *INS*, 566 F.2d 1103, 1105 (9th Cir. 1977); *Matter of Wong*, 12 I. & N. Dec. 271 (B.I.A. 1967).

We are not at all certain that application of the *Fleuti* standards in the suspension of deportation context is consistent with Congress' intent that the "continuous physical presence" requirement in Section 244(a)(1) be construed strictly. See pages 10–12, *supra*. However, the decision below, which ignores the standards established in *Fleuti*, is in direct conflict with the decisions of the other courts of appeals that have applied the *Fleuti* standards in this context.

For example, in *Heitland* v. *INS*, *supra*, the Second Circuit relied on both *Fleuti* and *Wadman* in concluding that the aliens' six week trip abroad was meaningfully interruptive of their continuous physical presence in this country. The court noted that while the purpose of the trip, to visit Mr. Heitland's ailing sister, was consistent with the intent to return and resume residence in the United States, other relevant factors militated strongly against a finding that the aliens' presence was continuous. 551 F.2d at 501–502. First, unlike Fleuti and Wadman, "who were at all times lawful permanent resident aliens prior to their departure, the Heitlands, once they remained beyond the six-month period for which they were admitted to stay in the United States, were at all times present in this country in violation of its laws." *Id.* at 502. Because the Heitlands had "no right at all to reside in this country at the time of their departure for their native land," their situation was markedly different from that of Fleuti and Wadman, "who had the right to reside in the United States, [and] would not have been subject to deportation if they had simply remained within this country's borders." *Ibid.* Second, the court noted that before embarking on their trip the Heitlands had to obtain

passports and visas, thus evidencing "the deliberateness with which [the trip] was undertaken." *Ibid.* Finally, the court pointed out that "in using implicitly deceptive methods to secure re-entry in the United States, the Heitlands were engaged in a course of conduct directly contrary to a 'policy reflected in our immigration laws.' " *Id.* at 503, quoting *Rosenberg* v. *Fleuti*, *supra*, 374 U.S. at 462.

The circumstances of this case are remarkably similar to those in *Heitland*. Here, respondent traveled abroad for three months but intended at all times to return to the United States. On the other hand, as in *Heitland*, respondent was illegally in the United States when she departed and, accordingly, she had no reasonable basis to expect the government to permit her to remain in this country or readmit her upon her return. Respondent obtained a passport prior to her departure, an event that should have caused her "to consider more fully the implications involved in [her] leaving the country." *Rosenberg* v. *Fleuti*, *supra*, 374 U.S. at 462. Finally, as both the immigration judge (App. C, *infra*, 28a) and the Board of Immigration Appeals (App. B, *infra*, 17a–18a) found, respondent knowingly misrepresented her status in order to secure reentry into the United States. Hence, the Second Circuit's statement in *Heitland* is equally applicable to respondent:

> The implicitly fraudulent circumstances of [her] return, when considered with the admitted illegality of [her] presence in the United States before [her] departure and the substantial period of time for which [she] absented [herself], do not present a picture of the type of hardship or injustice which *Fleuti* or its progeny were intended to remedy. This was a substantial and deliberate interruption of an illegal presence in the United States, accomplished through consciously misleading conduct.

551 F.2d at 503–504. The court below, however, disregarded the standards established in *Fleuti* and concluded that the BIA erred in finding respondent's absence meaningfully interruptive because "the hardships [of deportation] would be as severe if the absence had not occurred" (App. A, *infra*, 8a). This conclusion cannot be reconciled with the Second Circuit's construction of Section 244(a)(1) in *Heitland*.

The decision below is also in conflict with the decision of the Fourth Circuit in *McColvin* v. *INS*, *supra*. In *McColvin*, the alien was found deportable for staying in this country beyond the time authorized and was granted the privilege of voluntary departure. The day after he departed the United States the alien reentered this country as a nonimmigrant visitor for business authorized to remain for a period not to exceed six months. In concluding that the alien's one-day absence was meaningfully interruptive, the court observed that "any roots that petitioner had established in the United States were put down with the knowledge that his stay in this country was temporary, and, therefore, any plans or expectations for the future that he might have developed could not have been legitimate ones." 648 F.2d at 939. In addition, the court noted that the alien left "with the knowledge that, if he did not depart voluntarily, he would be deported. If he left with the intention of returning, that intention was disingenuous." *Ibid.*

Under the court of appeals' decision in this case and *Kamheangpatiyooth*, however, factors such as those adverted to by the Fourth Circuit in *McColvin* are "'only evidentiary' as to whether an absence breaks the continuity of seven years presence" (App. A, *infra*, 6a, quoting *Kamheangpatiyooth* v. *INS*, *supra*, 597 F.2d at 1257). McColvin's one-day departure was brief and undoubtedly did not affect the hardships he could be expected to suffer if he were later deported. Although

McColvin may have increased the risk of deportation as a result of his absence, the court below has held that an absence cannot be considered meaningfully interruptive unless *both* factors—an increase in the risk of deportation *and* a reduction in the severity of hardship—are present (App. A, *infra*, 8a).

In short, by holding that respondent's lengthy trip abroad and illegal reentry into the United States have no legal effect on her eligibility for suspension of deportation, the court of appeals has essentially read the "continuous physical presence" requirement out of the Act.[8] This result conflicts with the decisions of the other courts of appeals that have considered the issue.

3. Finally, and perhaps most important, the decision below is inconsistent with this Court's decision in *Rosenberg* v. *Fleuti*, *supra*. Although *Fleuti* and this case involve different sections of the Immigration and Nationality Act, since *Wadman* the courts and the BIA have treated the two sections as analytically analogous. Under *Fleuti*, a lawful resident alien is regarded as having made an "entry" within the meaning of 8 U.S.C. 1101(a)(13) if his departure was meaningfully interruptive of his permanent residence in the United States. If a departure is meaningfully interruptive for purposes of invoking the entry doctrine, then it should also be meaningfully interruptive of an alien's "continuous

[8] The decision below does not represent an isolated instance in which the Ninth Circuit has effectively disregarded the "continuous physical presence" requirement. See *Chan* v. *INS*, 610 F.2d 651 (1979), opinion withdrawn and petition for rehearing dismissed for mootness, 649 F.2d 753 (1980) (neither three-month trip to Hong Kong nor two-month trip to Austria were meaningfully interruptive); *de Gallardo* v. *INS*, 624 F.2d 85 (1980) (three and one-half month pleasure trip did not interrupt period of continuous presence); *Sida* v. *INS*, 665 F.2d 851 (1981) (month-long visit to Thailand to get married did not interrupt continuity of physical presence).

physical presence" within the meaning of Section 244(a)(1).

Under the standard adopted by the court of appeals, however, it would be virtually impossible to conclude in any given case that an alien has made a meaningful departure. Thus, in the Ninth Circuit at least, few if any lawful resident aliens who leave the United States will be excludable at the border pursuant to 8 U.S.C. 1225, 1226, because they will not be regarded as making an "entry" on their return.[9] Accordingly, the decision below will seriously hamper the efforts of immigration authorities to keep inadmissible aliens out of this country.

As the Fourth Circuit pointed out in *McColvin* v. *INS*, *supra*, 648 F.2d at 938, "[t]he criteria laid down in *Kamheangpatiyooth* clearly gave rise to a broader interpretation of 'continuous' than the *Fleuti* Court gave to 'intended.' " This result is ironic because the statute at issue in *Fleuti* was designed "to ameliorate the severe effects of the strict 'entry' doctrine" (374 U.S. at 462) with respect to lawful resident aliens, whereas the "continuous physical presence" requirement in Section 244(a)(1) was meant "to discontinue lax practices and discourage abuses" (H.R. Rep. No. 1365, *supra*, at 31) with respect to deportable aliens. In this case, the court of appeals nevertheless has held that deportable aliens who have illegally overstayed their visas and have used deceptive means to gain reentry

[9] In *Plasencia* v. *Sureck*, 637 F.2d 1286 (9th Cir. 1980), cert. granted *sub nom. Landon* v. *Plasencia*, No. 81-129 (Jan. 11, 1982), the Ninth Circuit held that even when a returning lawful resident alien has attempted to smuggle illegal aliens into this country contrary to a policy reflected in our immigration laws, and thus should be regarded as making an "entry" under *Fleuti*, that alien may not be excluded at the border but must be admitted into the United States and proceeded against, if at all, in deportation proceedings. This case, like *Plasencia*, is inconsistent with this Court's decision in *Fleuti*.

following a substantial absence will be eligible for the "exceptional * * * remedy" (*INS* v. *Jong Ha Wang*, *supra*, 450 U.S. at 145) of suspension of deportation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

ELLIOTT SCHULDER
Assistant to the Solicitor General

JULY 1982

APPENDIX A

AMENDED OPINION

NIYOM PHINPATHYA AND PADUNGSRI PHINPATHYA,
PETITIONERS,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

No. 80–7454.

United States Court of Appeals
Ninth Circuit.
Argued and Submitted May 6, 1981.

Decided Oct. 1, 1981.

As Amended on Denial of Rehearing and Rehearing
En Banc April 5, 1982.

Before CANBY, REINHARDT, Circuit Judges, and PFAELZER*, District Judge.

REINHARDT, Circuit Judge.

Petitioners appeal the denials of their applications for suspension of deportation. We reverse.

Petitioners, husband and wife, are natives and citizens of Thailand who first entered the United States as nonimmigrant students. Mr. Phinpathya entered in August, 1968 and Mrs. Phinpathya in October, 1969. They were authorized to remain in the United States until July, 1971, but they remained beyond that date without permission. In 1974, Mrs. Phinpathya visited her sick

*Honorable Marianna Pfaelzer, United States District Judge for the Central District of California, sitting by designation.

mother in Thailand for three months; she reentered the United States as the spouse of a nonimmigrant student.

Deportation proceedings commenced in January, 1977. Orders to Show Cause were issued charging petitioners with deportability under 8 U.S.C. § 1251(a)(2) as nonimmigrants who had remained beyond the time authorized. At the deportation hearing, petitioners admitted deportability and applied for suspension of deportation under 8 U.S.C. § 1254(a)(1). The immigration judge granted Mr. Phinpathya's application, but denied Mrs. Phinpathya's application. The immigration judge found Mrs. Phinpathya to be statutorily ineligible for suspension of deportation on the ground that she had not satisfied the seven years continuous physical presence requirement of section 1254(a)(1). Mrs. Phinpathya was given voluntary departure.

The immigration judge's rulings were appealed to the Board of Immigration Appeals (BIA). The BIA reversed as to Mr. Phinpathya on the ground that he failed to meet the extreme hardship requirement of section 1254(a)(1). The BIA affirmed as to Mrs. Phinpathya on the grounds that (1) she failed to meet the continuous physical presence requirement of section 1254(a)(1), and (2) she failed to meet the good moral character requirement of section 1254(a)(1).

Section 1254(a)(1) empowers the Attorney General, in his discretion, to suspend deportation.[1] To be eligible for this discretionary suspension of deportation, however, an alien must show: (1) continuous physical presence in the United States for the seven years immediately preceding his application for suspension of deportation, (2) good moral character for these seven years, and (3) extreme hardship to himself or to his

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[1] For the purpose of § 1254(a)(1), the Immigration and Naturalization Service acts as a delegate for the Attorney General.

spouse, parent or child who is an American citizen or a lawful permanent resident. 8 U.S.C. § 1254(a)(1). The issue in the case before us is whether the BIA erred in its determination that neither Mr. nor Mrs. Phinpathya was eligible for suspension of deportation.

A. Mr. Phinpathya

The BIA denied Mr. Phinpathya's application for suspension of deportation on the ground that he did not prove extreme hardship.[2] We must decide whether the BIA abused its discretion in its finding that Mr. Phinpathya would not suffer extreme hardship if deported. *See INS v. Wang*, 450 U.S. 139, 101 S.Ct. 1027, 67 L.Ed.2d 123 (1981) (per curiam).

In *Wang*, the Supreme Court stated that the Immigration and Naturalization Act commits the determination of extreme hardship "in the first instance to the Attorney General and his delegates, and [that] construction and application of [the extreme hardship] standard should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute." 101 S.Ct. at 1031. We proceed in our review of the decision of the BIA, therefore, mindful of the limited nature of our function.

This is not the usual case in which the parents of an American citizen child are to be deported. *Cf. Wang*, 101 S.Ct. at 1031. Here, the Phinpathyas have a young daughter, Nissa, who was born in the United States and is an American citizen. What distinguishes this case, however, is the fact that Nissa has epilepsy. She regularly suffers from convulsive attacks. Nissa's epilepsy, although controlled, requires constant medical attention. She has a personal physician whom she visits

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[2] The BIA held that Mr. Phinpathya satisfied the seven years continuous physical presence and the good moral character requirements of § 1254(a)(1).

weekly. She takes anti-convulsive medicine on a daily basis. Without constant medical attention and medication, Nissa's life would be endangered.

The BIA, in making its determination, considered both the hardship to Mr. Phinpathya and to Nissa.[3] It found no extreme hardship because there was insufficient evidence on the record that Nissa would receive inadequate medical care in Thailand. Following the mandate of the Supreme Court, we do not question this finding on the basis of our own view of what constitutes extreme hardship.

We do, however, question the finding relating to Nissa on a different ground. The BIA proceeded on the assumption that when evidence of a serious medical problem is presented, a finding of extreme hardship cannot be made unless there is a factual showing of inadequate medical care in the country to which the alien will be deported. It then based its hardship determination on the fact that there was no proof offered that medical care for epileptics was inadequate in Thailand.

While the absence of proof of inadequate medical care may in some cases be dispositive of extreme hardship claims based on medical problems, it is not the exclusive factor to be considered in all such cases. In this case, the BIA did not consider, for example, whether the mere removal, and uprooting of an epileptic child, wholly apart from the question of comparative medical care, constitutes extreme hardship. The effects on an epileptic child of a long trip and of being placed in a wholly different environment are factors that, at the

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[3] 8 U.S.C. § 1254(a)(1) requires that one eligible for suspension of deportation be "a person whose deportation would . . result in extreme hardship to . . . his . . . child, who is a citizen of the United States . . ." Thus, extreme hardship to Nissa is imputed, under this statutory provision, to Mr. Phinpathya. Mr. Phinpathya's extreme hardship, therefore, would be derivative.

least, bear on a hardship determination and should have been considered by the BIA. None of the reasons asserted by the BIA reflects consideration of those factors, although there is evidence in the record relating to them.

A failure to consider factors relevant to the determination of hardship is an abuse of discretion. *Santana-Figueroa v. INS*, 644 F.2d 1354, 1356 n.5 (9th Cir. 1981); *see Carnalla-Munoz v. INS*, 627 F.2d 1004, 1006 (9th Cir. 1980). Thus, the BIA's failure to consider the factors involved in uprooting an epileptic child from her community and moving her to Thailand constitutes an abuse of discretion. Accordingly, the order of the BIA as to Mr. Phinpathya is reversed and remanded for reconsideration of the question of extreme hardship.

B. *Mrs. Phinpathya*

The basic principles to be applied in determining whether an alien's departure is "meaningfully interruptive" of the seven years continuous presence requirement of section 1254(a)(1) were recently set forth by this court in *Kamheangpatiyooth v. INS*, 597 F.2d 1253 (9th Cir. 1979).[4] The court stated:

> To effectuate the purposes underlying the continuous period requirement, and to realize Congress's desire (identified in [*Rosenberg v.*] *Fleuti* [, 374 U.S. 449, 83 S.Ct. 1804, 10 L.Ed.2d 1000 (1963)]) to avoid exposing aliens to unexpected risks and unintended consequences, the Board must determine whether a particular absence during the seven-year period reduced the significance of the whole period as reflective of the hardship and unexpectedness of expulsion.

Id. at 1257. Thus, when deciding whether an absence is

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[4] These principles were reaffirmed in in [*sic*] *de Gallardo v. INS*, 624 F.2d 85, 86–87 (9th Cir. 1980).

"meaningfully interruptive" we must be mindful of what we identified in *Kamheangpatiyooth* as the Congressional purpose underlying the seven years continuous presence requirement:

> It was Congress's judgment that presence of that length was likely to give rise to a sufficient commitment to this society through establishment of roots and development of plans and expectations for the future to justify an examination by the Attorney General of the circumstances of the particular case to determine whether deportation would be unduly harsh . . . . Presence that is only intermittent suggests the alien has not become so attached to this country that the authorities should consider suspending normal operation of the immigration laws on his behalf.

Id. at 1256.

Three factors that are helpful in determining whether a departure is "meaningfully interruptive" are: (1) the length of the absence, (2) the reason for the absence, and (3) the necessity of travel documents. *de Gallardo v. INS*, 624 F.2d 85, 87 (9th Cir. 1980); *Kamheangpatiyooth*, 597 F.2d at 1257. These three factors, however, are "only evidentiary" as to whether an absence breaks the continuity of seven years presence. *Kamheangpatiyooth*, 597 F.2d at 1257. "To treat them as if they were in themselves the object of the inquiry may defeat the objectives of the statute." *Id.* at 1257–1258. Thus, the proper application of the *Kamheangpatiyooth* test is to view the circumstances in their totality, and analyze those circumstances in light of the Congressional purpose underlying the continuity requirement. *id.* at 1258; *see de Gallardo.*

With the exception of her three month trip to Thailand in 1974 to visit her sick mother, Mrs. Phinpathya was physically present in the United States for the eight years immediately preceding her application for

suspension of deportation. Although she travelled to Thailand with her two children, her husband remained in the United States during the absence, and she intended, at all times, to return to the United States.[5]

In concluding that Mrs. Phinpathya's trip to Thailand was "meaningfully interruptive," the BIA relied exclusively on its finding that "by her departure, she increased substantially the likelihood that her actual illegal status would be discovered" and that she thereby increased her risk of deportation. Although the BIA purported to apply the *Kamheangpatiyooth* test, it misinterpreted the basic thrust of that test and repeated the same error it had made in that case. In *Kamheangpatiyooth*, the immigration judge "fixed his attention directly on the duration of the absence, its purpose, and whether travel documents were obtained." 597 F.2d at 1257. This court reversed on the ground that it is error to treat isolated factors as determinative of the question of whether an absence is "meaningfully interruptive." By relying exclusively on the fact that Mrs. Phinpathya increased her risk of deportation by her absence, the BIA treated that factors as "the object of the inquiry," and failed to view the circumstances in their totality and in light of the underlying Congressional purpose.

Moreover, the BIA misread *Kamheangpatiyooth* in an even more elementary manner. In *Kamheangpatiyooth*, the court held that an absence cannot be

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[5]The facts here are similar in significant respects to those in *Kamheangpatiyooth* and *de Gallardo*. In those cases, this court reversed and remanded orders of the BIA, which held that the alien's departure was "meaningfully interruptive" of the seven year period. In *Kamheangpatiyooth*, the alien, a native and citizen of Thailand, left the United States for one month to visit his sick mother in Thailand; the alien intended, at all times, to return to the United States. In *de Gallardo*, the alien took a three and one-half month vacation in Mexico and Honduras.

"meaningfully interruptive" if two factors are present: (1) the hardships would be as severe if the absence had not occurred, and (2) there would not be an increase in the risk of deportation as a result of the absence. *Id.*[6] The court did not hold, however, as the BIA seems to believe, that an absence is, *ipso facto*, "meaningfully interruptive" if one, or even both, of those factors is not present, and it did not hold that an increase in the risk of deportation necessarily renders an absence "meaningfully interruptive." In relying exclusively on the increase in the risk of deportation as the basis for concluding that Mrs. Phinpathya's absence was "meaningfully interruptive," the BIA clearly misread the *Kamheangpatiyooth* discussion of that issue.

Accordingly, we hold that the BIA applied an erroneous legal standard in reaching its determination that Mrs. Phinpathya failed to meet the continuous presence requirement.

Our next inquiry is whether the BIA properly concluded that Mrs. Phinpathya was not of good moral character during the seven years preceding her application for suspension of deportation. 8 U.S.C. section 1101(f)(6) provides, *inter alia:*

> (f) For the purposes of this chapter—No person shall be regarded as, or found to be, a person of good moral character, who during the period for which good moral character is required to be established, is or was—

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[6] The court wrote:

> An absence cannot be significant or meaningfully interruptive of the whole period if indications are that the hardship of deportation to the alien would be equally severe had the absence not occurred, and that no significant increase in the likelihood of deportation could reasonably have been expected to flow from the manner and circumstances surrounding the absence.

Kamheangpatiyooth, 597 F.2d at 1257.

> (6) one who has given false testimony for the purpose of obtaining any benefits under this Chapter . . . ."

The Immigration and Naturalization Service contends that Mrs. Phinpathya gave "false testimony for the purpose of obtaining . . . benefits under this chapter," and thus was not of good moral character. We disagree.

Specifically, the Service points to three instances in which Mrs. Phinpathya gave "false testimony."[7] First, she stated on her application for suspension of deportation that she had made no departures from the United States since the time of her first entry. Although clearly false, the statement on her application did not constitute "testimony" within the meaning of sections 1101(f)(6) and 1254(a)(1). The term testimony does not encompass all statements, or even all statements made under oath. Testimony means a statement made by a witness under oath for the purpose of establishing proof of a fact to a court or tribunal. *People v. Gilbert*, 217 Cal.App.2d 662, 666, 31 Cal.Rptr. 920 (1963); *State v. Schifsky*, 243 Minn. 533, 69 N.W.2d 89, 93 (1955); Black's Law Dictionary 1324 (5th ed. 1979). It is distinguished from statements made under different circumstances, and from evidence derived from writings and

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[7] The Service also asserts that Mrs. Phinpathya "knowingly lied" to the American Consulate in Bangkok, in order to obtain a visa to return to the United States in 1974. Since the Service implicitly concedes that the statements made to the American Consulate in Bangkok were not "for the purpose of obtaining any benefit under this chapter," we do not consider whether she gave "false testimony" in that instance. Moreover, since the BIA did not rely on Mrs. Phinpathya's allegedly false statements on her visa application, we are unable to affirm the order of the BIA on that ground. *F.P.C. v. Texaco*, 417 U.S. 380, 397, 94 S.Ct. 2315, 2326, 41 L.Ed.2d 141 (1974); *Patel v. INS*, 638 F.2d 1199, 1201 (9th Cir. 1980).

other sources. *State v. Ricci*, 107 R.I. 582, 268 A.2d 692, 697 (1970).

Had Congress intended sections 1101(f)(6) and 1254(a)(1) to encompass all statements, or even all statements under oath, it would have so provided. When Congress intends that a statutory provision apply to all statements rather than just testimony, it has said so explicitly. For example, 18 U.S.C. § 1001 provides that "[w]hoever, in any matter within the jurisdiction of any department or agency of the United States . . . falsifies . . . or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document . . . shall be fined . . . or imprisoned . . . ." *See, also*, 18 U.S.C. §§ 1002–1027.[8] By limiting sections 1101(f)(6) and 1254(a)(1) to "false testimony," Congress deliberately provided that only a narrow class of statements and representations would constitute conclusive proof of lack of good moral character. The drastic consequences of the statute, which renders an alien who has given false testimony automatically ineligible for suspension of deportation, provides further support for a narrow interpretation of "false testimony."

Giving the term "false testimony" its ordinary meaning, as we do here, does not deprive the BIA of its discretion, or the opportunity to consider the significance of false statements. Under the statute, even if eligiblity is found to exist, the BIA must then decide, in its discretion, whether to grant the alien's request for suspension of deportation. In its determination of whether suspension of deportation is appropriate, the INS may weigh numerous factors, including false statements made by the alien. Thus, rejecting the harsh and

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[8] Even section 1001 is more limited than might appear from a literal reading of the provision. *See e.g., United States v. Bedore*, 455 F.2d 1109 (9th Cir. 1972).

sweeping interpretation of the term "false testimony" offered by the BIA creates no conflict with the Congressional purpose which underlies the statute.

Since Mrs. Phinpathya's written statement on her application for suspension of deportation is not a statement made by a witness under oath to establish proof of a fact to a court or tribunal, we hold that her statement is not "false testimony" within the meaning of the statute.

Second, at the deportation hearings, when Mr. and Mrs. Phinpathya were asked if it were true that they had not been out of the United States since their initial entries, the record shows the answer, "Yes, that's true." The answer is not followed on the record, however, by the parenthetical, "by both," as is every other answer to a question directed to both petitioners. The immigration judge noted that "it is possible that only one of the two respondents [petitioners herein] answered the question," and thus concluded that the record does not support a finding that Mrs. Phinpathya responded to the question. In so concluding, the immigration judge considered the testimony of the alternate trial attorney of the Service that Mrs. Phinpathya had indeed responded, but, apparently, gave it little weight. Although we are directly reviewing the order of the BIA, the determination made by the immigration judge deserves to be given much weight. *See Espinoza-Ojeda v. INS*, 419 F.2d 183 (9th Cir. 1969). The immigration judge was a witness to the specific event in question. Moreover, he was in the best position to evaluate the accuracy of the alternate trial attorney's recollection. After review of the record, we agree with the immigration judge's conclusion that the record does not support a finding that Mrs. Phinpathya gave "false testimony."

Third, the Service claims that Mrs. Phinpathya gave

"false testimony" when, at the deportation hearing, she testified that all statements on her application for suspension of deportation were true. The BIA, however, in concluding that Mrs. Phinpathya was not of good moral character, neither referred to, nor relied on, her testimony affirming the truth of her application. A decision rendered by an administrative agency "must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.'" *F.P.C. v. Texaco, Inc.*, 417 U.S. 380, 397, 94 S.Ct. 2315, 2326, 41 L.Ed.2d 141 (1974) (*quoting Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69, 83 S.Ct. 239, 245–46, 9 L.Ed.2d 207 (1962)). This court has recognized the application of this principle in the context of immigration proceedings. *Patel v. INS*, 638 F.2d 1199, 1201 (9th Cir. 1980); *Castillo-Felix v. INS*, 601 F.2d 459, 462 n.6 (9th Cir. 1979). Since we are reviewing the order and decision of the BIA, we may not affirm on the basis of Mrs. Phinpathya's testimony as to the truth of the statements in her application, and it is thus unnecessary to consider whether that testimony was "false testimony" within the meaning of the statute. Under the circumstances of this case, remand for consideration of whether Mrs. Phinpathya's testimony regarding the truth of the statements in her application was "false testimony" is appropriate.

In summary, we hold that (1) the BIA applied an erroneous legal standard in its determination that Mrs. Phinpathya failed to satisfy the seven years physical presence requirement, and (2) the BIA erred in its determination that Mrs. Phinpathya failed to satisfy the good moral character requirement. Accordingly, we reverse the order of the BIA as to Mrs. Phinpathya and remand with instructions to reconsider the questions of seven years continuous presence and good moral character.

Disposition

The order of the BIA is reversed as to both petitioners and remanded for proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals
Washington, D.C. 20530
JUN 6 1980

Files: A19 063 381
A21 272 984—Los Angeles

In re: NIYOM *PHINPATHYA*
PADUNGASRI *PHINPATHYA*

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:
Michael D. Ullman, Esquire
Bert D. Greenberg, Inc.
8484 Wilshire Blvd., Suite 730
Beverly Hills, California 90211

CHARGE:

Order:
Sec. 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2))—Nonimmigrant student—remained longer than permitted (both respondents)

APPLICATION: Suspension of deportation

In a decision dated November 13, 1978, the immigration judge found the respondents deportable as charged. He also denied the female respondent's application for suspension of deportation under section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1254(a)(1), but granted the application of that of the male respondent. The respondents have appealed from these determinations and the Service has cross-appealed. The respondents' appeals will be dismissed and the Service's cross-appeal sustained.

The respondents are a husband and wife, and natives

and citizens of Thailand. The husband entered the United States in August 1968, as a nonimmigrant student, and the wife entered in October 1969, also as a nonimmigrant student. In 1974, she left the United States and upon her return was admitted as the spouse of a nonimmigrant student. In January 1977, Orders to Show Cause were issued, charging the respondents with deportability under section 241(a)(2) of the Act, as nonimmigrants who had remained beyond the time authorized. At the deportation hearing, with benefit of counsel, the respondents admitted all of the allegations of the Order to Show Cause and conceded their deportability on the charge. They also applied for suspension of deportation under section 244(a)(1) of the Act. The immigration judge found that Mr. Phinpathya met the physical presence and good moral requirements, and that he would suffer extreme hardship through his daughter if he was deported. He also found that Mrs. Phinpathya was not statutorily eligible for suspension of deportation on the ground that she had not satisfied the statutory requirement of seven years continuous physical presence immediately prior to her application for suspension of deportation. He granted her voluntary departure.

On appeal, the respondents contend that Mrs. Phinpathya has met the physical presence requirements for suspension of deportation, and that deportation would also cause her extreme hardship. The Service in its cross-appeal contends that Mrs. Phinpathya does not have the necessary physical presence, and that she does not have good moral character, because she gave false testimony at the deportation hearing. In the case of the Mr. Phinpathya, the Service contends that the finding of extreme hardship was incorrect because his daughter would not suffer extreme hardship if he was deported.

We will deal with the case of Mrs. Phinpathya first. We agree with both the Service and the immigration

judge that she has not met the physical presence requirements of section 244(a)(1) of the Act. In January 1974, approximately four years after her initial entry into the United States, she returned to Thailand with her two children. She remained there until April 1974. Before her departure, she renewed her passport at the Thai Consulate in Los Angeles and also apparently obtained U.S. passports for her children. She has stated that she wished to visit her mother in Thailand. Shortly before her visit expired, she went to the American Consulate in Bangkok, Thailand and obtained a nonimmigrant visa as the wife of a student. She was aware at the time she applied for the visa that her husband had not been in student status since 1971. She did not inform the consul of this fact. Upon her return to the United States, she was admitted as the nonimmigrant spouse of a student. Her Application for Suspension of Deportation (Form I-256A) indicates that her initial authorization to remain as a student in her own right expired in July 1971. From that point on, she was in the United States illegally.

The respondents claim that these factors did not add up to a significant interruption in her physical presence, because she did not intend by her departure in 1974 to give up her residence in the United States. They cite *Wadman* v. *Immigration and Naturalization Service*, 329 F.2d 812 (9 Cir. 1964) for the proposition that the interruption can only be termed significant if viewed in balance with its consequences. The respondents assert that the departure was not significant because Mrs. Phinpathya did not intend to give up her residence and did intend to return with her children after a brief visit abroad and rejoin her husband at their home in the United States. Although *Wadman*, id., is clearly applicable to the present case, the Ninth Circuit has since that decision decided another case setting forth its view on the holding of *Wadman*, id.

In *Kamheangpatiyooth* v. *INS*, 597 F.2d 1253 (9 Cir. 1979), the court held that the issue in these cases is "whether an absence reduced the significance of the whole seven-year period as reflective of the hardship and unexpectedness of exposure to expulsion". id., at 1257.

In that case, a citizen of Thailand had been in the United States for somewhat over 12 years, but had, about seven years after his initial entry, left the United States for Thailand. His trip to Thailand lasted for one month, and was occasioned by the illness of his mother. Up until the time he left, he had been a nonimmigrant student in lawful status, and prior to his return to the United States, he had renewed his nonimmigrant student visa, having the bona fide intention of continuing his studies. His departure occurred between the fall and spring semesters, and he did in fact continue his studies after his return. It is clear from these facts, therefore, that the student had a reasonable expectation that his departure would not place him in a position jeopardizing his ability to return to the United States. He had been in lawful status before he left and returned with a proper claim to admission as a nonimmigrant student.

That is not the case with the present respondent. When she left in 1974, she had already remained beyond the time authorized. She was not a student. She was only able to obtain a visa to return by misrepresenting her status as the spouse of a student, knowing full-well that she had no right to claim that status. By her departure, she increased substantially the likelihood that her actual illegal status would be discovered, and ran the significant risk of not being able to return to the United States, regardless of her intention to rejoin her husband in the United States. Under the holding of *Wadman*, supra, this departure could not be

characterized as casual and innocent, involving deception to the degree that it did. It was consequently a significant interruption of her physical presence under this standard.

The same result holds true under the formulation of *Kamheangpatiyooth*, supra, for essentially the same reasons. Mrs. Phinpathya knew that she had no lawful status in the United States before she left. She also knew that she had no rightful claim to nonimmigrant status when she applied for a new visa. There was clearly a "reasonable basis for anticipating that the planned absence might imperil [her] status." *Kamheangpatiyooth, supra*, at 1259. She could not have reasonably expected to remain in the United States before her trip, as she was in an illegal status, and could not reasonably have expected to receive a nonimmigrant visa based on the false representation that her husband was a student, when she knew he was not. In fact, she had increased the prima facie likelihood that she would either be excluded or deported once her true status was discovered and her misrepresentation was known, because at that point, not only would she have been excludable under section 212(a)(20) of the Act, as one who had entered without a valid visa, but also under section 212(a)(19) as one who had secured a visa by fraud or willful misrepresentation of a material fact. Consequently, as she had made a significant departure and had interrupted her physical presence, she was statutorily ineligible for suspension of deportation.

To qualify for suspension of deportation, it was also necessary for her to show that she was a person of good moral character. The immigration judge found that she had not given false testimony to obtain a benefit under the immigration laws, and that even if she had, she had recanted the testimony in a timely manner. As the immigration judge noted in his decision, the transcript

does not indicate that Mrs. Phinpathya responded to the question asked by the immigration judge regarding departures from the United States subsequent to 1969. (Tr. p. 9). The record in addition shows that she had not listed the 1974 departure on her application for suspension. There is also the fact that an alternate Service trial attorney present at the hearing testified that Mrs. Phinpathya did state that she had not left in response to the question, although the interpreter did not translate the response to the question as coming from both respondents. (Tr. p. 82). It would therefore appear to us that Mrs. Phinpathya did give false testimony. Her justification for the false answer is not credible given the different opportunities she had to provide the correct information.

We also find that the false testimony was not recanted in a timely manner. For a recantation to be effective, it must be voluntary, timely and made before disclosure of the falsity becomes imminent. *Matter of Namio*, 14 I&N Dec. 412 (BIA 1973). Mrs. Phinpathya's admission that she had left occurred after she had been confronted with the truth. At that point it came too late. She cannot be considered a person of good moral character because she gave false testimony under the provisions of section 101(f)(6) of the Act in order to obtain a benefit, suspension of deportation. This is a second basis for statutory ineligibility under section 244(a)(1) of the Act. We see no reason therefore to address ourselves to the question of extreme hardship, as such a finding, if possible, would not change the outcome of her application for suspension.

As for Mr. Phinpathya, we agree that he has shown both the requisite physical presence and good moral character. We do not agree that he has established extreme hardship. As he is a young, well educated man in good health, with substantial assets, he himself would not appear likely to suffer extreme hardship to such a

degree that he would be set apart from other aliens forced to leave the United States. Although he has been in the United States for 12 years, he still has family ties in Thailand and with his education and financial resources should be able to reestablish himself in Thailand.

The question of hardship through his daughter is a more difficult problem to resolve. The immigration judge's decision in finding that the daughter would suffer extreme hardship emphasizes the idea that she is "old enough to be aware of her roots in the community, at school, and her neighborhood". He also referred to the deportation of her parents either causing a break-up of the family, or forcing her to move to a country about which she knows very little. Although he noted that she suffers from an epileptic condition, he did not find that she would suffer harm because she could not receive adequate treatment for that condition in Thailand. There is a letter in the record from a doctor who has treated the daughter, in which it is stated that she would receive "definitely inferior" treatment in Thailand, when judged against American medical standards. The immigration judge found that this information was not supplied by an expert on medical treatment for epilepsy in Thailand, and he apparently discounted the letter for this reason.

Although we do not agree with the immigration judge that the doctor must be an expert on Thai medical standards, it was necessary for the respondent to establish that the doctor's assertion had a substantial basis, and was not simply personal conjecture. Without substantiation, his opinion does not provide persuasive proof that the daughter's return to Thailand would subject her to extreme medical hardship.

Without a medical basis to establish extreme hardship, it must be shown that the daughter would suffer

extreme hardship for some other reason. Since she is young, and would be going to Thailand with her immediate family, there appears to be no ground on which to find personal hardship. While she may have difficulties in adjusting to life in Thailand, there has been no showing that emotional, educational or other hardship would be of such a degree as to set her apart from other children taken to live in a foreign culture. *See, Banks* v. *INS*, 594 F.2d 760 (9 Cir. 1979). The respondents' appeals will accordingly be dismissed, and the Service's cross-appeal sustained.

ORDER: The respondents' appeal is dismissed.

FURTHER ORDER: The Service's cross-appeal is sustained.

FURTHER ORDER: The respondents are permitted to depart from the United States voluntarily within 30 days from the date of his order and under such conditions as the District Director deems appropriate; and in the event of failure to so depart, the respondents shall be deported as provided in the immigration judge's order.

/s/ _____
DAVID L. MILHOLLAN
Chairman

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES IMMIGRATION COURT
Los Angeles, California

File: A19 063 381
A21 272 984

November 13, 1978

In the Matter of

NIYOM PHINPATHYA
PADUNGASRI PHINPATHYA

Respondents

IN DEPORTATION PROCEEDINGS

CHARGE:

241(a)(2) of the Act, nonimmigrant remained longer

APPLICATION:

Suspension of deportation under Section 244(a)(1) of the Act and, in the alternative, voluntary departure

IN BEHALF OF RESPONDENTS:

Michael D. Ullman, Esq.
8484 Wilshire Blvd. Ste. 730
Beverly Hills, Calif 90211

IN BEHALF OF SERVICE:

William Odencrantz, Esq.
Trial Attorney
Los Angeles, Calif 90012

WRITTEN DECISION OF THE IMMIGRATION JUDGE

DISCUSSION AS TO DEPORTABILITY: Respondents are husband and wife, ages 39 and 30, who are both natives and citizens of Thailand. The husband en-

tered the United States in Honolulu, Hawaii on August 3, 1968 and at that time he was inspected and admitted as a nonimmigrant student for a temporary period and authorized to remain in the United States until July 25, 1971. He has never departed from the United States. The husband admits all five allegations and the charge contained in his Order to Show Cause and I find that he is deportable by evidence which is clear, convincing and unequivocal. I adopt the five allegations as my findings of fact and the charge as my conclusion of law.

Regarding the wife, she first entered the United States at Honolulu, Hawaii on October 11, 1969 at which time she was inspected and admitted as a nonimmigrant student for a temporary period and authorized to remain in the United States until July 25, 1971. However in January 1974 she returned to Thailand with her two United States citizen children and, as shown in lodged allegations 3 and 4 (Exhibit No. 13), she last entered the United States at Honolulu, Hawaii on or about April 18, 1974 at which time she was inspected and admitted as nonimmigrant spouse of a student for a temporary period and authorized to remain in the United States until January 30, 1975. She has not departed from the United States since that time. The wife admits all five allegations contained in her Order to Show Cause as well as the two lodged allegations regarding her last entry into the United States, and she admits the charge contained in her Order to Show Cause. I find that she is deportable by evidence which is clear, convincing and unequivocal. I adopt allegations 1 and 2 contained in her Order to Show Cause, allegations 3 and 4 in her lodged charge form and allegation 5 in the Order to Show Cause as my findings of fact, and I adopt the charge as my conclusion of law. Deportability is not in issue in either the husband or the wife's case.

DISCUSSION AS TO ELIGIBILITY FOR SUSPENSION OF DEPORTATION:

Both respondents have applied for the relief of suspension of deportation under Section 244(a)(1) of the Act. This section requires that the respondents shall have been physically present in the United States for a continuous period of at least seven years immediately preceding the date of their application and that they prove that, during all such period, they were and are persons of good moral character. In addition each respondent has a burden of showing that his deportation would result in extreme hardship to himself or to a spouse, parent or a child who is a citizen of the United States or an alien lawfully admitted for permanent residence.

Considering extreme hardship first, the issue is whether the respondents have established that it would be an extreme hardship to themselves personally or to their two United States citizen children if they were deported to Thailand. Exhibit No. 8 is the California birth certificate of respondents' daughter, Nissa, born September 11, 1970, at Los Angeles, California. Nissa is now 8 years old. Exhibit No. 9 is the California birth certificate of respondents' son, Nelson, born February 19, 1972, at Los Angeles, California. Nelson is now 6 ½ years old. Respondents testified that for the last ten years the husband has been working as a produce clerk for the Ralph's Grocery Company. Three years ago they bought a coffee shop, which gives the husband two separate jobs, and the wife herself works full time in the coffee shop. Two years ago they bought their own home. Last year the husband was awarded a Masters Degree in Business Logistics (Exhibit No. 21). They testified that their family is now used to the American way of life and that it would be difficult for the husband to get a good job in Thailand. The children have just en-

tered the third grade and the first grade in elementary school. They speak very little of the Thai language. While the parents are attempting to teach the two children the Thai language, the children are always speaking English at home. Exhibits No. 17 and 18 are doctors letters concerning the older child's epilepsy; however, these letters are only received in evidence to show the oldest child's medical condition at this time. The doctor who wrote the letters is not an expert on medical treatment for epileptics in Thailand. Both parents and the youngest child are in good health.

Based on the testimony and evidence presented, I find that the respondents have failed to establish that it would be an extreme hardship to either of them personally or to their 6 ½ years old United States citizen son, Nelson, if the respondents were deported in Thailand. The mere fact that an alien's economic opportunities in a foreign country may be somewhat less than they are in the United States is not by itself sufficient to establish the extreme hardship required for suspension of deportation under Section 244(a)(1) of the Act, *Matter of Kim*, Interim Decision 2318 (BIA 1974).

However, based on all the evidence, I find that it would be an extreme hardship to the United States citizen daughter, Nissa, now age 8, if respondents were deported. She is now attending the third grade in elementary school. She is old enough to be aware that her roots in the community, at school, and her neighborhood, are in jeopardy in being severed. Such uprooting would not be an extreme hardship if the change were for the benefit of this child's family unit, such as her father being required to move to retain his employment; however, here the deportation of the parents would either break up the family unit or result in Nissa moving to a country she knows little about. Since the respondents have established that it would be an extreme hardship to their United States daughter, Nissa, if they

were deported to Thailand, we shall move on to other issues in this case.

Regarding the husband's moral character, he testified that he has never been arrested by the police or convicted of any crime in any country in the world. Exhibit No. 12 is a favorable Report of Investigation and no derogatory information concerning his moral character has been submitted. I find that the husband has been a person of good moral character for at least the last seven years.

Regarding the wife's moral character, there is an issue whether or not she is statutorily barred from establishing good moral character under Section 101(f)(6) of the Act as one who has given false testimony for the purpose of obtaining any benefit under the Act. Before seeing the Report of Investigation and the lodged allegations (which show that the wife made an exit and reentry into the United States in 1974), the respondents were asked the following question on the record during one of the earlier sessions of the hearing; "Neither one of you have been out of the United States at any time since you arrived here in 1968. Is that true?" The answer to the question came through the Thai interpreter and the answer was as follows. "That's true your Honor." The interpreter did not add "by both." It is possible that only one of the two respondents actually answered the question. The alternate trial attorney who was appearing on behalf of the Government at that time was later called as a witness by the regular trial attorney assigned to this case. The alternate trial attorney testified that when the Immigration Judge was going over the suspension of deportation applications (Exhibit No. 2 and (2)(a)) with the respondents informally off the record before asking the same questions again later on the record, that the wife was quiet when she was asked about any absences from the United States since 1969, and that she then stepped outside the court-

room with her husband and their then alternative attorney (the regular attorneys on both sides were not present at that time). The alternate trial attorney testified that upon their return to the court room both were asked about absences from the United States on the record and the wife answered the question as well as the husband even though the interpreter failed to add "by both." After the applications were signed and sworn to and placed in evidence along with the accompanying documents, the then trial attorney offered in evidence the Report of Investigation (Exhibit No. 12) which reflects that the wife had in fact departed and reentered the United States in 1974. There was another conference with the alternate attorney for the respondents and the respondents, resulting in the respondents' alternate attorney stating for the record that the wife was wrong about her last entry being in 1969 and that the last entry was in fact in 1974 as related in the Report of Investigation. This resulted in lodged allegations (Exhibit No. 13) which the wife admitted. Considering all the testimony and evidence concerning the issue of possible false testimony I find that the wife did not give false testimony for the purpose of obtaining and [*sic*] benefit under this Act. Even if I had found that there had been false testimony, I would find that there had been a timely recantation a few minutes after it had occurred. No other derogatory information was submitted concerning the wife's moral character and I find that she has been a person of good moral character for at least the last seven years.

The husband testified that he has not been out of the United States since his arrival on August 3, 1968. No evidence has been submitted to show any absence and I find that the husband has been physically present in the United States for a continuous period of at least the last seven years. Therefore, he is statutorily eligible for the relief of suspension of deportation.

Regarding the wife's continuous physical presence, she was absent from the United States from January 1974 to April 18, 1974. The wife testified that she left the United States in January 1974 intending to visit her mother in Thailand. She took her two United States citizen children with her while her husband remained in the United States. She testified that she did not intend to abandon her United States residence but rather intended to return at some future date. About a month before she left the United States she obtained a new Thailand passport from the Thai Consul here in Los Angeles. She planned to use the new passport to return to the United States, however she did not have a nonimmigrant visa allowing her to return to the United States when she left for Thailand. Therefore, after arrival in Thailand she went to the American Consul there and obtained a nonimmigrant visa as the wife of a foreign student in the United States. She neglected to inform the American Consul that her husband's student visa has expired three years earlier, in 1971. So the wife reentered the United States with her United States children on April 18, 1974 by using the recently obtained Thailand passport which contained the even newer nonimmigrant visa as the spouse of a student (who in fact had been out of status for three years).

The wife's three months absence was not brief, innocent, or casual. The absence would have been longer than three months if she had not obtained the spouse of a student visa as fast as she did obtain it. It was not casual because she had to obtain a new Thailand passport, as well as a nonimmigrant visa from the American Consul, to return to the United States. It was not innocent because she failed to inform the American Consul that she was the wife of a student who had been out of status for three years (and therefore not entitled to the nonimmigrant visa she received). Based on the testimony and evidence presented, I find that the wife has not

been physically present in the United States for a continuous period of at least seven years immediately preceding the date of her application for suspension of deportation. Therefore, the wife is statutorily ineligible for suspension of deportation and her application will be denied.

The remaining issue is whether or not the husband's application for suspension of deportation should be granted as a matter of administrative discretion. Since the wife's application will be denied, should the husband's application be denied for that reason only? Counsel on both sides state that they have found no case to cite as to what should be done when one spouse is statutorily eligible for suspension of deportation, and the other spouse is not. If the husband was the one who had the break in physical presence I would deny the wife's application because the husband is the main breadwinner for the family. When the respondents were asked what will happen if the husband's application were granted and the wife's application were denied, they indicated that they don't believe that could happen because the husband does not make enough money to support his wife in Thailand with or without the children.

An Immigration Judge has no authority to allow a wife to remain in the United States if her application for suspension of deportation is denied while her husband's application is granted. Stays of deportation for humanitarian reasons are solely within the jurisdiction of the District Director. Since the wife's application for suspension of deportation will be denied, the only relief available to her is voluntary departure and she may soon be required to depart the United States. I am going to give the husband the opportunity to make up his own mind as to what he should do at that time. The husband may elect to return to Thailand with his wife.

It is not essential that I make that decision for him. I am going to grant his application for suspension of deportation as a matter of administrative discretion. Unless Congress disapproves, or I am overruled on an appeal, eventually the husband will become a lawful permanent resident if he remains in the United States. At that time he will be able to petition for his wife as a second preference immigrant. Between now and then he will have many decisions to make regarding himself, his wife, and his two United States citizen children.

The wife has applied for the privilege of voluntary departure, and I will grant it to her as a matter of administrative discretion.

The wife has designated Thailand as the country of deportation.

ORDER: IT IS ORDERED that the female respondent's application for suspension of deportation under Section 244(a)(1) of the Act be, and hereby is, denied.

IT IS FURTHER ORDERED that in lieu of an order of deportation the female respondent be granted voluntary departure without expense to the Government on or before sixty days from the date of service of this decision or any extension beyond such date as may be granted by the District Director, and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED that if the female respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: the female respondent shall be deported from the United States to Thailand on the charge contained in her Order to Show Cause.

ORDER: IT IS ORDERED that the deportation of the male respondent be suspended under the provisions

of Section 244(a)(1) of the Immigration and Nationality Act.

IT IS FURTHER ORDERED that if Congress takes no action adverse to the granting suspension of deporation, that proceedings shall be canceled and appropriate action be taken pursuant to Section 244(d) of the Immigration and Nationality Act.

IT IS FURTHER ORDERED that in the event Congress takes action adverse to the order granting suspension of deportation, the male respondent's proceedings shall be reopened upon notice to the male respondent.

/s/ _____
ROBERT T. GRIFFIN
Immigration Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NIYOM PHINPATHYA AND
PADUNGSRI PHINPATHYA, PETITIONERS,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT.

NO. 80-7454
I&NS NOS.
A21-272-984
A19-063-381
FILED: APR 5 1982
PHILLIP B. WINBERRY
Clerk, U.S. Court of Appeals

ORDER

Before: CANBY and REINHARDT, Circuit Judges, and PFAELZER,* District Judge

The panel as constituted above has voted to deny the petition for rehearing. Judges Canby and Reinhardt voted to reject the suggestion for rehearing en banc and Judge Pfaelzer made no recommendation as to the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. F. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The panel has voted to file the attached Amended Opinion amending the Opinion as decided October 1, 1981.

*Honorable Mariana R. Pfaelzer, United States District Judge for the Central District of California, sitting by designation.

Office - Supreme Court, U.S.
FILED
JAN 14 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-91

In the Supreme Court of the United States

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

PADUNGSRI PHINPATHYA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BERT D. GREENBERG
8484 Wilshire Boulevard
Suite 730
Beverly Hills, California
90211
(213) 655-4900

PETITION FOR CERTIORARI FILED JULY 16, 1982
CERTIORARI GRANTED NOVEMBER 1, 1982

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

80-7454

I & NS # A21-272-984 & A19-063-381

RELEVANT DOCKET ENTRIES

1980	
AUG 25	Paid Fee. —vt—
AUG 25	Filed Petition for review of an order of the I&NS. —vt—
AUG 25	Docketed cause & entd appearance of counsel. —vt—
AUG 25	Notified counsel for the respondent issued copies. —vt—
OCT 27	Filed as of 10/8 cert admin record on appeal in one vol, pldgs four cert copies pv
OCT 27	Petnre oepngn brief due 8 December 1980 pv
DEC 9	Filed Mot & Ord (Clk) granting petrs an ext of time to Dec. 31. 1980 to file opening brief. jc
1981	
JAN 12	Filed orig & 15 Pet opening brief (12/31). pf
FEB 6	Fld mtn & ord (CLK) gtng Respondent ext of time to file its Answering brief to: 2-9-81. bbm
FEB 11	Filed org & 4 Resp ans brief (2/9). pf
FEB 13	Rec'd Resp Statement of Related Cases (to CASE-FILE). pf
APR 29	Rec'd respondent's addl. authorities. (panel) 4/28 —dmf—
APR 29	Filed order (Banby) Counsle are requested to address in their oral arguments the effect, if any, upon the present proceedings of the decision of the Supreme Court in INS v. Wang, 49 U.S. Law Week 3640 (3/2/81). —vt—
MAY 6	Argued & submitted before: WCC, SR, CJJ; & Pfaelzer, DJ (C. Cal.)
OCT 1	As of Oct 1, Ordered opinion filed (Reinhart) & judg to be filed
OCT 1	Filed as Oct 1, Filed—Opinion The order of the BIA is reversed as to both petitioners and remanded for proceeding consistent with this opinion. —ho—
OCT 1	As of Oct 1, Filed & Entd Judgment. —ho—
OCT 15	Filed respondent's motion for ext of time to file petition for rehearing. (panel) 10/13 —dmf—
NOV 23	Rec'd resp petition for rehearing & suggestion for rehearing en banc. (panel) (motion pending)

NOV 27	Filed order (CANBY, REINHARDT & PFAELZER) The petition for rehearing & suggestion for rehearing en banc heretofore rec'd is now filed. —vt—
NOV 27	Filed resp petition for rehearing & suggestion for rehearing en banc.
DEC 28 1982	Stay mandate (Wallace) per Oscar T. ck
APR 7	Filed, as of 4/5/82, Order (Canby, Reinhardt, CJJ; Pfaelzer, DJ) The panel as constituted above has voted to deny the petition for rehearing. Judges Canby and Reinhardt voted to reject the suggestion for rehearing en banc and Judge Pfaelzer made no recommendation as to the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. (FRAP 35(b). The petition for rehearing is denied and the suggestion for rehearing en banc in rejected. The panel has voted to file the attached Amended Opinion amending the Opinion as decided October 1, 1981. ck
APR 7	As of 4/5/82, Filed Amended Opinion. ck
APR 16	MANDATE ISSUED
23	Recvd SC notice of filing petition for cert on 7/16/82, SC #82-91. pn
5	Filed certified copy of SC order of 11/1/82, granting cert. (copies to panel) pn

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

File A-19 063 381
21 272 984

MATTER OF NIYOM PHINPATHYA AND
PADUNGASRI PHINPATHYA, RESPONDENTS

IN DEPORTATION PROCEEDINGS

TRANSCRIPT OF HEARING

Before: Robert T. Griffin, Immigration Judge
Date: CONTINUED: March 1, 1978 Place: Los Angeles, CA
Transcribed by Victoria Maillet By Sony
Official Interpreter Rabin Sinskul
Language: Thai

APPEARANCES:

For the Service:
Thomas Fong, Esq.
Los Angeles, CA

For the Respondent:
Steven D. Karp, Esq.
8484 Wilshire Boulevard,
Suite 730
Beverly Hills, CA 90211

[8] IMMIGRATION JUDGE TO RESPONDENTS THROUGH INTERPRETER:

Q Are you the same Mr. and Mrs. Phinpathya who were last before me on May 16, 1977?

A Yes, we did.

Q The purpose of this continued hearing is again to consider whether or not you two should be deported from the United States. Do you both understand?

A Yes, (by both) your Honor.

Q Would you both stand please and raise your right hand to be sworn? (both comply). Do you and each of you solemnly swear all testimony in this proceeding to be the truth, the whole truth and nothing but the truth, so help you God?

A Yes. (by both).

JUDGE TO MR. FONG:

Mr. Fong at the last hearing the cases were adjourned for the investigation of the suspension applications. I assume that's been completed?

MR. FONG:

Yes, it has your Honor.

JUDGE:

May I first have the suspension applications themselves? And we will go off the record while they are brought up to date.

OFF THE RECORD BACK ON THE RECORD

JUDGE TO RESPONDENTS:

Q You are both still living at 7515 Belaire Avenue, North Hollywood, California. Is that true?

[9] A True, your Honor.

JUDGE TO MALE RESPONDENT:

Q You came in 1968 as a student and you were inspected and admitted in Honolulu. Is that true?

A That's true your Honor.

JUDGE TO FEMALE RESPONDENT:

Q You entered the United States in 1969 at Honolulu, Hawaii and was inspected and admitted also as a student. Is that true?

A That's true your Honor.

JUDGE TO RESPONDENTS:

Q Neither one of you have been out of the United States at any time since you arrive here in 1968 and 1969. Is that true?

A That's true your Honor.

JUDGE TO MALE RESPONDENT:

Q You have been working at Ralph's Grocery Company in Sunland as a clerk since 1968. Is that true? Earning approximately $250.00 a week. Is that true?

A Yes, that's true.

JUDGE TO FEMALE RESPONDENT:

Q You have not been working. Is that true?

A That's true your Honor.

Q You do work at your husband's separate business, the Premiere Coffee Shop in Hollywood, California. Is that true?

A It's true your Honor.

JUDGE TO MALE RESPONDENT:

Q You have this Premiere Coffee Shop business in addition to your [10] regular job at Ralph's Grocery. Is that true?

A That's true your Honor.

JUDGE TO RESPONDENTS:

Q Is this your first marriage?

A Yes, your Honor (by both).

JUDGE TO MALE RESPONDENT:

Q Your assets total about $69,000.00. Is that true?

A That's true, your Honor.

JUDGE TO RESPONDENTS:

Q You have two children born here in California now aged 7 and 6. Is that true?

A Yes (by both) your Honor.

Q Have either one of you ever received any welfare?

A No (by both) your Honor.

JUDGE TO MALE RESPONDENT:

Q Have you ever belonged to any organizations except the three listed on your application?

A No, your Honor.

JUDGE TO FEMALE RESPONDENT:

Q Have you ever belonged to any organizations?

A No, your Honor.

JUDGE TO RESPONDENTS:

Q Have you ever been member of or associated with the Communist Party?

A No (by both) your Honor.

Q Have either one of you ever been arrested by the police or convicted of any crime in any country in the world?

[11] A Never (by both) your Honor.

JUDGE TO MALE RESPONDENT:

Q Your father is deceased. Is that correct?

A That's correct, your Honor.

Q Your mother and your brother live in Thailand. Is that true?

A That's true, your Honor.

Q Do you have any other brothers or sisters?

A No, your Honor.

JUDGE TO FEMALE RESPONDENT:

Q Your father and mother, two sisters and three brothers live in Thailand. Is that true?

A That's true your Honor.

Q You also have a brother who is living here in Los Angeles, California. His name is Songsak (sic). Is that true?

A That's true, your Honor.

Q Your brother Sonsak is not a citizen of the United States or a lawful permanent resident of the United States. Is that true?

A Yes, your Honor.

JUDGE TO RESPONDENTS:

Q Would you each stand one more time please to be sworn to these applications? (Both comply). Do you and each of you solemnly swear that all statements in these application Forms I-256A are the truth, the whole truth and nothing but the truth, so help you God?

A Yes (by both) your Honor.

Q Thank you, please be seated.

[12] JUDGE:

The application for suspension of deportation Form I-256A for the male respondent Niyom Phinpathya is marked *Exhibit No. 2* in evidence. The application for suspension of deportation Form I-256A for his wife, Padungasri, is marked *Exhibit No. 2A* in evidence. I also have an affidavit of witness Randall Kent Cindrich in behalf of the male respondent; the affidavit being executed on March 2, 1977. This affidavit is marked *Exhibit No. 3* in evidence. An affidavit executed by Donna Cindrich on March 2, 1977 is marked *Exhibit No. 4* in evidence. Affidavit of Somchai Singhapnttanapong executed on March 4, 1977 on behalf of male respondent is marked *Exhibit No. 5* in evidence. Affidavit of Malinee Koopirom executed on March 4, 1977 in behalf of the female respondent is marked *Exhibit No. 6* in evidence. Affidavit of Voravut Uttayaya executed on March 7, 1977 on behalf of the female respondent is marked *Exhibit No. 7* in evidence. I also have a birth certificate for the respondent's child Nissa; born in Los Angeles on September 11, 1970. This birth certificate is marked *Exhibit No. 8* in evidence. The birth certificate of respondents' child Nelson; born in Los Angeles on February 19, 1972 is marked *Exhibit No. 9* in evidence. Also submitted is a three page affidavit executed by the male respondent, Niyom Phinpathya, executed on March 4, 1977. This affidavit is marked *Exhibit No. 10* in evidence. And finally, a three page affidavit executed by the female respondent, Padungasri Phinpathya, executed on March 4, 1977. This three page affidavit is marked *Exhibit No. 11* in evidence.

[13] JUDGE TO MR. FONG:

Mr. Fong you have indicated that the investigation has been completed. Has counsel had an opportunity to read it?

MR. FONG:

No, he has not your Honor.

JUDGE:

We will go off the record while counsel and respondents have an opportunity to read the report of investigation.

OFF THE RECORD BACK ON THE RECORD

JUDGE TO MR. KARP:

Counsel you had an opportunity to read the report?

MR. KARP:

I have had an opportunity to read the report, your Honor. I have noticed that there is a copy of a Form I-94 in that report for the female respondent that showed that she entered the United States in 1974. I have just had time to speak to the female respondent privately and she says that she does now remember that she did enter the United States in 1974 and therefore we are withdrawing her suspension application.

JUDGE TO MR. FONG:

Mr. Fong, I assume you are going to offer that in evidence at this time.

MR. FONG:

Yes, I am. Your Honor, do I make a statement as to the remarks of the respondents' attorney now or later?

[14] JUDGE:

You can make it now if you wish.

MR. FONG:

I submit that the statements made by the female respondent were under oath and she perjured herself on the record.

MR. KARP:

Your Honor, I'll object to that. This is not a criminal proceeding and I don't feel that perjury is the proper charge at this particular instance.

MR. FONG:

Well, it is definitely not a mistake as

MR. KARP:

It's not the truth. it's a mistake.

JUDGE TO MR. KARP:

May I have the investigator report? I assume you have no objection counsel?

MR. KARP:

No, I have no objection.

JUDGE:

The report of investigation dated September 19, 1977 consisting of three pages and sub Exhibits A, B and C; these documents are all collectively marked *Exhibit No. 12* in evidence. I will now read the report.

JUDGE TO MR. FONG:

Mr. Fong if the Government had noticed the female respondent's last entry was April 18, 1974 as reflected in sub Exhibit B to Exhibit 12, [15] the report of investigation. Why did they charge her in the Order to Show Cause issued in 1977 as the last entry being 1969?

MR. FONG:

Your Honor, until the investigation was initiated on their suspension applications the Government was not aware that she had another entry in Honolulu, Hawaii until that date. I assume therefore that the I-213 stating the 1969 entry as her latest entry was given to the Government by the respondent.

JUDGE:

Yes, the Order to Show Cause indicates her entry as October 11, 1969 and that's what she admitted. And she admitted deportability. Do you wish to lodge a new allegation No. 3 in the female respondent's case?

MR. FONG:

Yes, I do, your Honor.

JUDGE:

We will stand in recess for that purpose.

OFF THE RECORD BACK ON THE RECORD

JUDGE:

Let the record show that the trial attorney has handed me the lodged charge Form I-261 dated today in the female respondent's case with new allegations 3 and 4.

JUDGE TO MR. KARP:

Counsel has this been served upon you and the female respondent?

MR. KARP:

I have a copy your Honor, yes.

[16] JUDGE:

The lodged charge Form I-261 is marked *Exhibit No. 13* in evidence.

JUDGE TO MR. KARP:

Counsel of course you have the right to a continuance before proceeding to this lodged allegation form. Do you wish a continuance or do you waive that right?

MR. KARP:

No, I do wish a continuance your Honor. Your Honor, I'd like to make one other statement. I believe I stated earlier that the female respondent returned to the United States in 1974 and that we were thereby withdrawing her suspension application. I did not mean to state that we were withdrawing her suspension application.

JUDGE:

I see. Your theory would then be that this was a brief absence?

MR. KARP:

Correct, and not a meaningful entry.

JUDGE:

I see.

JUDGE TO MR. FONG:

Mr. Fong, I propose to adjourn this hearing to a later date. Do you have any objection?

MR. FONG:

Yes, I do your Honor. I move to sever the cases and adjudicate the suspension application on the male respondent today.

JUDGE:

The motion is denied. We will keep the cases together at this point [17] until the next hearing. We will go off the record while the Immigration Court Clerk schedules another hearing date for this case.

OFF THE RECORD BACK ON THE RECORD

JUDGE:

This hearing is adjourned to May 9, 1978 at 1 o'clock pm.

JUDGE TO MR. KARP:

Is that date satisfactory counsel?

MR. KARP:

Yes, it is your Honor.

MR. FONG:

Yes, it is your Honor.

JUDGE TO MR. KARP:

Counsel do you waive further notice?

MR. KARP:

Yes, I do.

JUDGE:

The hearing is so adjourned.

HEARING ADJOURNED

I hereby certify that to the best of my knowledge and belief, the foregoing pages 6 through 17 are a complete and accurate transcript of the hearing herein.

VICTORIA MAILLET 5-10-79

VICTORIA MAILLET *Clerk DMT*

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

File A-19 063 381
21 272 984
MATTER OF NIYOM PHINPATHYA AND
PADUNGASRI PHINPATHYA, RESPONDENTS

IN DEPORTATION PROCEEDINGS

TRANSCRIPT OF HEARING

Before: Robert T. Griffin, Immigration Judge
Date: CONTINUED: September 6, 1978
Place: Los Angeles
Transcribed by Victoria Maillet By Sony
Official Interpreter Somnuk Khosavanna
Language Thai

APPEARANCES:

For the Service:
WILLIAM B. ODENCRANTZ, ESQ.
Los Angeles, CA

For the Respondent:
MICHAEL D. ULLMAN, ESQ.
8484 Wilshire Boulevard, Suite 730
Beverly Hills, CA 90211

[18] IMMIGRATION JUDGE TO RESPONDENTS THROUGH INTERPRETER:

Q Are you the same Mr. and Mrs. Phinpathya who were last before me on March 1, 1978?

A Yes.

Q At the last hearing you were represented by Attorney Steven D. Karp. At this hearing you are once again represented by Attorney Michael D. Ullman of the same law firm. Do you want Mr. Ullman to represent you today?

A Yes, sir (by both).

Q Would you both stand please and raise your right hands to be sworn? (both comply). Do you and each of you solemnly swear all testimony in this proceeding to be the truth, the whole truth and nothing but the truth so help you God?

A Yes, (by both).

Q Thank you. Please be seated.

JUDGE TO MR. ULLMAN:

Mr. Ullman at the last hearing on the record on March 1, 1978 the trial attorney at that time submitted a lodged charge form now in evidence as Exhibit No. 13 containing not a new charge but merely two new allegations, numbers 3 and 4. And your colleague at that time, Attorney Steven Karp requested a continuance in order to meet the lodged allegation. Do you waive further reading of the lodged allegations and are you ready to plead at this time?

MR. ULLMAN:

Yes, we do.

[19] JUDGE:

How do you plead to the new allegations 3 and 4?

MR. ULLMAN:

We admit both allegations 3 and 4.

JUDGE:

This of course refers only to the female respondent. Is that correct?

MR. ULLMAN:

That's correct. At this time we would also like to show that this was a brief and casual and innocent de-

parture from the United States and that Mrs. Phinpathya had been in the United States continuously since October 11, 1969 and was gone from the United States for three months.

JUDGE:

So the date on the Order to Show Cause was an earlier entry?

MR. ULLMAN:

That's correct.

JUDGE:

Then you are indicating that you are not abandoning the suspension application in her case.

MR. ULLMAN:

That's correct. Also, in the alternative we would like to have the wife's case considered with the husband as a beneficiary to reunite the family unit.

JUDGE:

Each one has their own separate suspension application in the record.

[20] JUDGE TO MR. ODENCRANTZ:

Mr. Odencrantz, I guess it's obvious but comparing the female's Order to Show Cause with the lodged allegations, you're abandoning allegation 3 and 4 on the Order to Show Cause. Is that correct?

MR. ODENCRANTZ:

That is correct, your Honor. The Government's contends the last entry as so indicated on the lodged charge.

JUDGE:

Right. So all that's left on the Order to Show Cause and the allegations then is 1, 2 and 5.

MR. ULLMAN:

That's correct.

MR. ODENCRANTZ:

1, 2 and 5 on the original and 3 and 4 on the lodged.

JUDGE:

All right, thank you. And of course the charge remains the same.

JUDGE TO MR. ULLMAN:

You're still admitting the charge. Is that correct counsel?

MR. ULLMAN:

That's correct.

JUDGE:

In the female respondent's case.

MR. ULLMAN:

Yes.

JUDGE TO MR. ULLMAN:

Apparently then Mr. Ullman the next step is for you to proceed on [21] the suspension application. Is that correct?

MR. ULLMAN:

That's correct.

MR. ODENCRANTZ TO JUDGE:

Your Honor, if I may, I will indicate that the application as currently in the record, signed and sworn to under oath reflects that the female respondent has no departures from the United States. It is the Government's contention that she is 101(f)(6) and is statutorily ineligible for the relief of suspension of deportation because she has given false testimony before this Court to obtain this benefit.

JUDGE:

You are referring now to the female respondent's suspension application in evidence as Exhibit No. 2A?

MR. ODENCRANTZ:

I am your Honor.

JUDGE TO MR. ULLMAN:

Yes, Mr. Ullman; that was sworn to before me on March 1, 1978.

MR. ODENCRANTZ TO JUDGE:

From my review of the record your Honor, it appears she retracted only after being confronted with the investigative report and after pursuit of that matter by the trial attorney.

JUDGE:

Now this both happened during the same hearing. Is that correct Mr. Odencrantz?—The false statement and the recantation; both on March 1st?

[22] MR. ODENCRANTZ:

Your Honor, my understanding is that she was confronted with this and—at that hearing. And I don't think that it's ever been recanted, so to speak. Her attorney was informed of that and at that time the Service told him they were going to lodge a charge. I don't think the respondent has ever herself recanted the claim that she entered the United States until today's date of course when her new attorney, Mr. Ullman, had pled to the allegations as contained in the lodged charge.

JUDGE:

Well, Mr. Odencrantz, of course you weren't here at the last hearing. There was another trial attorney; just as Mr. Ullman was not here. My notes seem to indicate that Mr. Karp was given an opportunity to read the investigation report off the record when Mr. Fong offered it. And when we came back on the record Mr. Karp indicated that the wife was wrong about the last entry in 1969.

MR. ODENCRANTZ:

My notes reflect that Mr. Karp was first confronted with the situation. He went out and spoke with his clients. He first came in and then when asked by the Immigration Judge if the statements as to no departure was true, he stated they were true. He then went out a second time and talked to his clients and then after the second time he had read the investigative report. I have no record in my notes, which appear to be quite comprehensive, that the respondent herself has ever testified to anything about departures. And other than the plea statement of Mr. Ullman a few moments ago, that her departure was [23] for three months, I don't see anything contained in the record at the present time regarding the length of her departure, the reason for her departure and the reason that she failed to tell the Court of her departure.

JUDGE:

I agree about the notes; my notes don't show that the lady testified either. But they do show that Mr. Karp stated that the wife was wrong about her last entry in 1969 and that the last entry was in fact 1974 as related in the investigation report. In other words counsel was speaking for the record on behalf of the female respondent.

MR. ODENCRANTZ:

I would contend your Honor, at this time, that there's a prima facie show in the 101(f)(6) and she is statutorily ineligible for any discretionary relief, particularly the relief she is now seeking on that record.

JUDGE TO MR. ULLMAN:

Mr. Ullman.

MR. ULLMAN:

I believe at this time I would like to ask for some testimony from the female respondent as to exactly—as to her exits and departures and entries into the United States and the reason for stating so on the application.

JUDGE:

Well, I agree that's what we're here for. Go right ahead Mr. Ullman.

[24] MR. ULLMAN TO FEMALE RESPONDENT:

Q. Mrs. Phinpathya when was the original time you entered the United States?

A When I first arrive here it's October 11, 1969.

Q Since 1969 have you ever departed from the United States?

A Yes, I did.

Q When did you depart the United States?

A Date is unknown but month is January 1974.

Q In January 1974 where did you go?

A To Thailand.

Q Why did you leave the United States at that time?

A I visit my mother.

Q How long were you outside the United States?

A Three months.

Q When did you reenter the United States?

A April.

Q April of 1974?
A Yes.
Q When you left the United States in January 1974 did you intend to give up your residence in the United States?
A Yes.
Q Mrs. Phinpathya I don't believe you understood the question.
MR. ODENCRANTZ:
That's a conclusion your Honor. I think the question could be rephrased without the conclusionary language of the—
[25] JUDGE:
If that's an objection, it's sustained. Ask the question.
MR. ULLMAN TO FEMALE RESPONDENT:
Q Mrs. Phinpathya when you left the United States in January 1974—did you leave the United States and not intend to come back to the United States?
MR. OPENCRANTZ:
Your Honor, I believe the male respondent is speaking to the female respondent.
JUDGE:
Yes, and he's also nodding his head up and down.
JUDGE TO MAKE RESPONDENT:
Q Mr. Phinpathya I want you to stop communicating with your wife. She'll answer her own questions. You'll have your opportunity to answer questions when counsel speaks to you. Do you understand sir?
A Yes, I understand.
JUDGE:
Mr. Ullman.
MR. ULLMAN TO FEMALE RESPONDENT:
Q Mrs. Phinpathya in 1974 was your home in the United States?
A At that time I didn't buy the house yet.
Q But were you living in the United States since 1969?
A Yes.
Q When you left the United States in 1974 did you intend to return to the United States?

A Yes.

[26] Q When you went to visit your mother in 1974 was this for a short visit?

A Yes.

Q When you left the United States in 1974 did you intend to return within a short period of time?

JUDGE:

Let the record show that the respondent is hesitating to answer. Apparently she does not understand the question.

JUDGE TO FEMALE RESPONDENT:

Q Mrs. Phinpathya if at any time you do not understand a question, please say—I don't know. Do you understand that?

A Yes.

Q Or, if it applies, say—I don't understand the question. Do you understand that?

A Yes.

JUDGE:

Go ahead Mr. Ullman.

MR. ULLMAN TO FEMALE RESPONDENT:

Q Mrs. Phinpathya in 1974 . . . at that time you had two children in the United States. Is that correct?

A Yes. That's correct.

Q And you husband was in the United States at that time also?

A Yes.

Q You decided to visit your mother in 1974. Was that for a short visit?

A Yes sir.

[27] Q In January of 1974 when you left the United States, in your mind, were you planning on coming back to the United States?

A Yes.

Q What did you consider your home? Was your home here in the United States or was it in Thailand?

MR. ODENCRANTZ:

Your Honor, I think the question is objectionable, as leading. I will indicate to the Court, however, that she did reenter the United States with an F status

where of course she had to have a foreign residence abroad which she had no intention of abandoning. Otherwise when she entered the United States at that time she would have been committing fraud at entry.

JUDGE:

Mr. Odencrantz you'll get your opportunity in a moment to—

MR. ODENCRANTZ:

Your Honor, my objection is to the frame of the question.

JUDGE TO MR. ULLMAN:

Counsel you're not pinning down the question to 1974. You're talking about her intended residence. Maybe you'd better rephrase it again and be sure that you pinpoint 1974 in your question.

MR. ULLMAN TO FEMALE RESPONDENT:

Q Mrs. Phinpathya in your application for suspension of deportation, it stated that you arrived in the United States October 11, 1969. And that you had made no departures from the United States. Was that true? Have you ever departed the United States since 1969?

[28] JUDGE:

I think she's already testified to that counsel. Go on to something else.

MR. ULLMAN TO FEMALE RESPONDENT:

Q When you filled out the application was it your intention not to disclose this 1974 departure?

JUDGE:

Excuse me again, counsel. Let me give you the application, Exhibit No. 2A in evidence. Perhaps you may want to show that to respondent so she will know exactly what you are talking about.

MR. ULLMAN TO FEMALE RESPONDENT:

Q I'm referring to Exhibit 2A, this is your application for suspension of deportation. It says under Item No. 6 that there were no departures from the United States. Why did you not state that you had departed

the United States in 1974 for a short period of time of three months?

A (no response)

Q Do you have any recollection of this form at all?

MR. ODENCRANTZ:

Your Honor, there's a question I believe that hasn't been answered yet.

JUDGE:

Let the record show there was a long hesitation. The respondent has now picked up the application and she is studying it.

JUDGE TO MR. ULLMAN:

Perhaps you had better rephrase it again counsel.

[29] MR. ULLMAN TO FEMALE RESPONDENT:

Q Mrs. Phinpathya who prepared this form for you?

A I don't know.

Q Item No. 6. It's in English. It states that there were no departures from the United States. You stated today that you had departed the United States in 1974. Do you recollect why you did not put down that you had departed the United States in January 1974 and reentered in April of 1974?

A I forgot.

MR. ULLMAN TO JUDGE:

I have nothing further.

JUDGE:

Mr. Odencrantz.

MR. ODENCRANTZ:

Thank you, your Honor.

MR. ODENCRANTZ TO FEMALE RESPONDENT:

Q Mrs. Phinpathya when you left the United States in January of 1974 did you have a passport in your possession?

A Yes.

Q When did you get that passport?

A Thai Consulate.

Q When—did you get it?

A I couldn't recollect.

Q How long before you left the United States prior to that trip in January of 1974, did you pick up the passport at the Thai Consulate?

A One month.

[30] Q So one month before you went on the trip you went down to the Thai Consulate and you obtained a new passport. Is that right?

A Yes.

Q When you went to Thailand you had your new passport with you. Is that correct?

A Yes.

Q Where was your old passport?

A I don't know. I forgot.

Q When you left the United States did you purchase a ticket?

A No.

Q How did you get on the airplane if you didn't have a ticket?

JUDGE:

Excuse me Mr. Odencrantz.

JUDGE TO FEMALE RESPONDENT:

Q Did you travel alone to Thailand?

A With my children.

Q Your children went with you?

A Yes.

Q Both children?

A Yes.

Q Did your husband remain in the United States?

A Yes.

Q Did your husband buy the airplane ticket for you and your children?

A Yes.

JUDGE:

Mr. Odencrantz.

[31] MR. ODENCRANTZ TO FEMALE RESPONDENT:

Q Mrs. Phinpathya when you got to Thailand and you wanted to come back to the United States did you use the same passport?

A Yes.

Q Did you go to the American Consulate to get a new visa for that passport?

A Yes.

Q Did you tell them your husband was a student?

A Yes.

Q Is that why you were issued a passport?

JUDGE:

Passport or the visa?

MR. ODENCRANTZ TO FEMALE RESPONDENT:

Q Oh, excuse me. The visa, excuse me.

JUDGE:

You're talking now about the American Consulate in Thailand?

MR. ODENCRANTZ:

Yes, your Honor.

JUDGE:

Very well. Would you rephrase the question again?

MR. ODENCRANTZ TO FEMALE RESPONDENT:

Q Mrs. Phinpathya is that why the American Consulate in Bangkok gave you a new visa for your passport?

A Yes.

Q Mrs. Phinpathya in 1975 was your husband going to school?

A Yes. Since 1974.

[32] Q Where was your husband going to school in 1975?

A Pacific—

MR. ODENCRANTZ TO JUDGE:

Your Honor, respondent's spouse continues to help her with her testimony and I think it's improper that he do that.

JUDGE TO MR. ULLMAN:

Yes, perhaps counsel, we should have the male respondent sit on the other side of you.

JUDGE:

Let the record show that the male respondent has changed his chair and the female respondent is now seated right next to counsel.

JUDGE TO MR. ODENCRANTZ:

Go right ahead Mr. Odencrantz.

MR. ODENCRANTZ TO FEMALE RESPONDENT:

Q In 1975 was your husband going to school, and if so, where?

JUDGE:

Do you mean '74 or '75. She came back in '74.

MR. ODENCRANTZ:

I'm sorry, your Honor; '74, yes. Thank you for correcting me.

MR. ODENCRANTZ TO FEMALE RESPONDENT:

Q In 1974?

A Pacific State University.

Q Isn't it true that at that time he was working for Ralphs Grocery Company as a produce clerk?

A Yes.

Q Isn't it also true Mrs. Phinpathya that your husband had no permission [33] to be—no extension of stay as student here in the United States subsequent to 1971?

A Yes.

Q Did you know this when you went to Thailand?

A Yes.

JUDGE TO FEMALE RESPONDENT:

Q You just nodded your head up and down and the interpreter said yes. From now on open your mouth and say something in the Thai language; don't just nod your head. Say yes or no, or give an answer. Do you understand Ma'am?

A Yes, I understand.

MR. ODENCRANTZ TO FEMALE RESPONDENT:

Q Did you tell the American consulate in Bangkok, Thailand when you got your new visa that your husband was no longer an in status student in the United States?

A No, I didn't explain to American Consulate section in Bangkok but I got I-20, see?

Q Mrs. Phinpathya in the deportation hearing which was held on March 1, 1978, did the Immigration Judge go over the application with you?

A I don't know.

JUDGE:

Excuse me. I think at this time we'll take a brief recess while while we play the relevant portions of the tape from March 1st.

BRIEF RECESS

JUDGE:

Back on the record. Let the record show that the parties are the [34] same. We attempted to obtain the cassette tape for March 1, 1978, however, it was checked out by the Steno Pool. And when checking with the Steno Pool it turned out that it had been sent down to San Ysidro, California to some transcribers there who are handling some hearings. Apparently, there is another hearing of mine on that same cassette which is now being typed. So the tape is not available at this time.

JUDGE TO FEMALE RESPONDENT:

Q Mrs. Phinpathya on March 1, 1978 you signed this application after swearing to it before me. Is that true?—I'm showing you now Exhibit No. 2A.

A Yes.

Q And I did ask you many of the questions on that form including whether you had been out of the United States since 1969. Is that true?

A At that time I did not understand.

JUDGE:

All right Mr. Odencrantz, go ahead.

MR. ODENCRANTZ:

Thank you, your Honor.

MR. ODENCRANTZ TO FEMALE RESPONDENT:

Q Mrs. Phinpathya why didn't you tell the Immigration Judge that you had been outside the United States on this trip, that we have been talking about for the last half hour? Why didn't you tell the Judge, Mrs. Phinpathya about the trip that you had made outside of the United States on March 1, 1978, when you appeared before him and gave testimony [35] under oath?

A I do not understand that at that time.

Q Was this not read to you by the interpreter on March 1, 1978?

JUDGE:

Are you referring to exhibit 2A?

MR. ODENCRANTZ TO FEMALE RESPONDENT:

Q I'm referring to Exhibit No. 2A. Isn't it true that the Immigration Judge went over this application with you and that the questions and answers on the application were interpreted for you by the Thai interpreter on that day?

A Yes.

Q Then why didn't you tell the Immigration Judge about your trip in 1974?

A At that time I still did not understand and I thought that the question meant start from 1969.

Q I notice that this document is typed. Did you type this document?

A I don't know.

MR. ULLMAN:

If I can be of any assistance at this time, it was typed by one of the secretary's in our office. Generally, our office procedure is we have them fill out an application in their handwriting and then it's typed onto a form.

MR. ODENCPANTZ TO FEMALE RESPONDENT:

Q Did you fill out an application in your own handwriting and give it [36] to Mr. Greenberg's secretary?

A I forgot already. It quite a long time ago.

MR. ODENCRANTZ TO JUDGE:

Your Honor, I really have no further questions on this issue at this time. It's still the opinion of the Service Mrs. Phinpathya has given false testimony to obtain a benefit, to wit, the suspension for deportation for which she is now applying. And that no credible explanation has been advanced as to anything which would be excusable. And I believe your Honor, that she is statutorily ineligible both for this reason and based upon the testimony which has been elicited because of her departure from the United States not being within the ambit of *Wadman v. INS*. She has departed the United States for a substantial period of time. She used travel documents. She obtained a

passport just before she left the United States to depart. She went to the American Consul abroad and obtained a new visa to put in that passport. And in fact your Honor, when she went outside the United States it is the Government's position she had no reasonable expectation that she would be able to return because she did not have a visa and would have to get a visa even though her husband were—as she said she knew at the time she left, was out of status. And therefore she was statutorily ineligible to obtain a visa as an F-2. I think your Honor, that she is statutorily ineligible.

MR. ULLMAN TO JUDGE:

I believe you can tell by Mrs. Phinpathya's testimony that she really doesn't remember that time that she filled out the application [37] and she really doesn't even remember at the time of the last hearing on March 1st. I wasn't present at that time so I really don't know if the application was gone over word for word; whether it was explained to her that there were any departures or if there were any. I think she is very shy at the moment and—

JUDGE:

I routinely cover that in my own questioning for my own benefit. I'm sorry we don't have the tape available today for both your benefit and Mr. Odencrantz' benefit and the respondent's; not only the questions to her on the issue of the break in physical presence but also Mr. Karp's response after the investigation report now in evidence as Exhibit No. 12. I assume Mr. Karp kept some notes which you've had an opportunity to look at. And that the trial attorney at that time, Mr. Fong, has made notes which Mr. Odencrantz has had an opportunity to read. But in any case Mr. Odencrantz has covered two issues here and do you wish to make a response to those issues at this time? Or do you wish to put on further evidence regarding those issues or other issues in this case?

MR. ULLMAN:

At this time I believe that Mrs. Phinpathya is recanting on her statement on the form for suspension

of deportation that she had departed the United States in 1974. I believe it was a brief and casual departure. She left for a period of three months. Her family was here. She had a home here. Her husband had been working here in the United States and she intended to return to the United States. It was a brief departure to visit her mother and she took [38] the two children with her and then she returned within a three month period of time. Her husband, Mr. Phinpathya, has been continuously in the United States since 1968 and again for family unity, even if you find that there is a break in the continuity of her presence in the United States for humanitarian reasons, I request that you keep the family together and consider their application; her part of her husband's application.

MR. ODENCRANTZ:

Your Honor, I don't believe the Court has any right to make any personally derivative beneficiary of an application for suspension of deportation. This in responding to the very last item Mr. Ullman is stating to. She of course is a case entirely separate and apart from her husband's status. Also, I will take issue with just one thing. We have no evidence that it was under three months. We have evidence that she left in January of '74 and returned April 18, 1974. So the period can either be somewhat less than three months or somewhat more than three months; as much as possibly 18 days more than three months. I think it's not necessarily significant but of course the respondent bears the burden of proof on any time which is alleged. The Service has proven she came back April 18th.

JUDGE:

Very Well.

* * * * *

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

ORDER TO SHOW CAUSE and NOTICE OF HEARING

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA: File No. A21 272 984

In the Matter of Mrs. Padungsri PHINPATHYA
616 North Virgil, Apartment 4
Los Angeles, California 90004 AKA: Padungsri RUNGRUANGRONG
Address (number, street, city, state, and ZIP code)

Respondent.

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

A

1. You are not a citizen or national of the United States;
2. You are a native of Thailand and a citizen of Thailand;
3. You entered the United States at Honolulu, Hawaii on or about October 11, 1969 (date)
4. You were admitted as a nonimmigrant student for a temporary period and authorized to remain in the United States until July 25, 1971;
5. You have not departed from the United States.

See Legal Charge Form

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

A Section 241 (a) (2) of the Immigration and Nationality Act, in that, after admission as a nonimmigrant under Section 101 (a) (15) of said act, you have remained in the United States for a longer time than permitted.

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at 300 North Los Angeles Street, Los Angeles, California, Room 8112 on February 24, 1977 at 8:30 a.m. m, and show cause why you should not be deported from the United States on the charge(s) set forth above.

Dated: January 25, 1977

(signature and title of issuing officer)
ASSISTANT DISTRICT DIRECTOR FOR INVESTIGATIONS
LOS ANGELES, CALIFORNIA
(City and state)

cc: Bert D. Greenberg, Esquire

459 - 1
560 - 1
819 - 2
998 - 1 and 2

I-A
Dec 24 1977

Form I-221 (Rev. 7-1-73)Y 1130-1-2

NOTICE TO RESPONDENT

ANY STATEMENT YOU MAKE MAY BE USED AGAINST YOU IN DEPORTATION PROCEEDINGS

THE COPY OF THIS ORDER SERVED UPON YOU IS EVIDENCE OF YOUR ALIEN REGISTRATION WHILE YOU ARE UNDER DEPORTATION PROCEEDINGS. THE LAW REQUIRES THAT IT BE CARRIED WITH YOU AT ALL TIMES

If you so choose, you may be represented in this proceeding at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Order to Show Cause and that you are deportable on the charges set forth therein. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. Failure to attend the hearing at the time and place designated hereon may result in a determination being made by the Immigration Judge in your absence.

You will be advised by the Immigration Judge, before whom you appear, of any relief from deportation, including the privilege of departing voluntarily, for which you may appear eligible. You will be given a reasonable opportunity to make any such application to the Immigration Judge.

Failure to attend the hearing at the time and place designated hereon may result in your arrest and detention by the Immigration and Naturalization Service.

REQUEST FOR PROMPT HEARING

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

_____
(signature of respondent)

Before:

_____ _____
(signature and title of witnessing officer) (date)

CERTIFICATE OF SERVICE

This order and notice were served by me on 27 JAN 1977 (date) in the following manner:

A Ochoa
(signature and title of employee or officer)

MAIL

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

Form approved.
OMB No. 43-R0334

File No. A 21 272 984

APPLICATION FOR SUSPENSION OF DEPORTATION

(Under Section 244 of the Immigration and Nationality Act)

(PLEASE READ ADVICE AND INSTRUCTIONS BEFORE FILLING IN FORM)

FEE STAMP

(1) I, the undersigned, hereby request that my deportation be suspended under the provisions of section 244 of the Immigration and Nationality Act. I believe that I am eligible for suspension of deportation because such deportation would result in extreme hardship to myself and/or to my children
(Husband, wife, father, mother, child, children)

who is/are ☑ citizen(s) ☐ lawful permanent resident(s) of the United States; and I have been physically present in the United States without any absence since October 12, 1969

(2a) My present legal name is: (First, Middle, Last) PADUNGSRI PHUPANYA			(2b) My name given at birth was: Padungsri Tumyruangrong		
(3) I have been known by the additional names: None	My sex is Female	(Height) 5'	(Color of eyes) Brown	(Color of hair) Black	(Complexion) Brown
(4) I was born at (Place and country) Samutprakarn, Thailand	on (Month) (Day) (Year) 4/10/48	My nationality is (Country of which citizen or subject) Thailand			
(5) I now reside at (Apt. number and/or in care of) (Number and street) 7515 Bellaire Avenue, North Hollywood, (City or town) California (State) 91605 (ZIP Code)					

(6) I first entered the United States under the name of (First) Padungsri (Middle) Tumyruangrong (Last)	on (Month) (Day) (Year) 10/11/69	At (seaport, airport, or land border port) Honolulu, Hawaii	
Name of vessel or other means of conveyance Japan Air Lines	I was admitted as a (Insert visitor, crewman, transient, student, permanent resident, or other) I-1		
For a period of time to expire (Insert date of period for which admitted) I-94 unavailable	My last extension of stay in the United States expired on (date) 7/[illegible]/71		
If not inspected or if entry occurred at other than a regular port, describe the circumstances as accurately as possible			

Since the date of my first entry I departed from and returned to the United States at the following places and on the following dates: (If you have never departed from the United States since your original date of entry, insert "no departures.")

DEPARTED		RETURNED		INSPECTED AND ADMITTED (Answer Yes or No)
PORT	DATE (Month–Day–Year)	PORT	DATE (Month–Day–Year)	
No departures				

155

(7) During the last 10 years, I have been in the United States as listed below: (If less than 10 years, set forth the information for the period you have been in the United States.) List present address FIRST, and work back.

STREET AND NUMBER–CITY OR TOWN–STATE (Include number of hotel room, furnished room or apartment in present address.)	FROM– Month	FROM– Year	TO– Month	TO– Year
7515 Bellaire Ave., North Hollywood, Ca.	9	76	present	
616 N. Virgil Avenue, #4, Los Angeles, Ca.	8	72	8	76
826 S. Union Avenue, Los Angeles, Ca.	10	69	8	72

(Use a separate sheet for additional entries.)

EXHIBIT No. 1-A
MAR 1 1978
(Date)

Form I-256A
(Rev. 6-1-75)N

(1)

81

(8) During my residence at the places in the United States named above I was employed by the following-named persons or firms: (Begin with present employment and proceed backwards. Any periods of unemployment or school attendance should be specified.

Full Name of Employer	Address of Employer	Earnings Per Week (Approximately)	Type of Work Performed	From— Month	From— Year	To— Month	To— Year
None							

(Use a separate sheet for additional entries.)

(9) If self-employed, describe nature of business, name under which business is conducted, its address and net income derived therefrom _____
coffee shop, Premiere Coffee Shop, 5333 Hollywood Blvd., Hollywood, Ca. $1,500/mo.

(10) I: ☒ AM ☐ AM NOT MARRIED	If married, the name of my spouse is	We were married on (Month) (Day) (Year)	at (City or town) (State or country)
	Niyom	2/19/70	Los Angeles, California
She or he was born at (City or town) (State or country)		on (Month) (Day) (Year)	and is a citizen of (Country)
Nakornnayok, Thailand		12/[illegible]/38	Thailand
(11) (If your spouse is other than a native born United States citizen, answer the following.) She or he arrived in the United States at (City or town)		on (Month) (Day) (Year)	☐ was ☒ was not admitted for permanent residence.
Honolulu, Hawaii		/,/	
was naturalized on (Month) (Day) (Year)		(Place naturalized)	

(12) I ☐ have ☒ have not been previously married. (If previously married, give facts relative to name of each prior spouse, and manner, date, and place of termination of each prior marriage) _____

(13) My present spouse ☐ has ☐ has not been previously married. (If spouse previously married, give facts relative to name of each prior spouse and manner, date, and place of termination of each prior marriage) _____

(14) My spouse ☐ is ☐ is not employed. If employed, give salary and name and address of place of employment _____
~~Ralph's Grocery Co., 10544 Burbill Ave., Burbank, Ca., $[illegible]/mo.~~

(15) The assets of myself (and my spouse), not including clothing and household necessities, are: Self (or jointly owned with spouse):

Cash, Stocks and Bonds	$ 4,000.00	Cash, Stocks and Bonds	$
Real Estate	$ 60,000.00	Real Estate	$
Other (Describe) car	$ 5,000.00	Other (Describe)	$
Total	$ 69,000.00	Total	$

(16) I have 2 children. Give information requested in each column:

Name	Age	Place of Birth	Now Residing at—	Citizen of	Lawful Permanent Resident of U.S.
~~Nissa~~	~~7~~	~~California~~	~~North Hollywood, Ca.~~	~~USA~~	
~~Nelson~~	~~5~~	~~California~~	~~North Hollywood, Ca.~~	~~USA~~	

The names, assets, and earnings of my children in the United States who have separate incomes are: _____

not applicable

(17) I ☐ have ☒ have not after entry into the United States acquired the status of an exchange alien.

(18) I ☐ have ☒ have not submitted yearly address reports as required by the amendment to the Alien Registration Act effective September 23, 1950, and the Immigration and Nationality Act.

(19) I ☐ have ☒ have not been the recipient of public or private relief or assistance. If you have, give full details including date, place, and amount received _____

(20) If you have served in the Armed Forces of the United States, state branch (Army, Navy, & service number, etc.) not applicable

Date and place of entry on duty _____ Date of discharge _____

Type of discharge (honorable, dishonorable, etc.) _____ I served in active duty status from _____ to _____.

(21) If male, did you register under the Selective Service (Draft) Law of 1917, 1918, 1940, 1948, 1951, or later Draft Laws? Yes ☐ No ☐

If "Yes," give date, Selective Service number, local draft board number and your last draft classification. not applicable

Were you ever exempted from service because of conscientious objection, alienage, or any other reason? Yes ☐ No ☐

(22) Have you ever deserted from the military or naval forces of the United States while this country was at war? Yes ☐ No ☒

(23) Have you ever left the United States or the jurisdiction of the district where you registered for the draft to avoid being drafted into the military or naval forces of the United States? Yes ☐ No ☒

(24) List membership, past or present, in all organizations, societies, clubs, unions, and associations, whether in the United States or a foreign country, and the periods and places of such membership. Include membership in any Communist Party or organization or in any section, subsidiary, branch, affiliate, or subdivision of any such party or organization:

None

(25) I ☐ have ☒ have never (either in the United States or any other country) been arrested, summoned into court as a defendant, convicted, fined, imprisoned, or placed on probation, or forfeited collateral for an act involving a felony, misdemeanor, or breach of any public law or ordinance.

If answer is in the affirmative in any particular, give complete information in the space immediately following _____

(Use a separate sheet for additional entries.)

(26) I can return to my country of ☐ Birth ☐ Nationality ☐ Last Residence without fear of persecution. If unable to return to any (Check the appropriate block or blocks)

of these countries, give reasons _____

(27) I ☒ would ☐ would not be able to arrange a trip outside the United States to obtain an immigrant visa. If not, explain: _____

(28) Give the requested information about your parents, brothers, and sisters. As to residence, show street address, city, and state, if in the United States; otherwise show only country.

Name	Relationship To Me	Now Residing At	Birthplace	Citizen Of	Lawful Permanent Resident of U.S.?
Siankia	father	Thailand	Thailand	Thailand	no
Nonkyo	mother	thailand	Thailand	Thailand	no
Chindarat	sister	Thailand	Thailand	Thailand	no
Vijai	brother	Thailand	Thailand	Thailand	no
Padungporn	sister	Thailand	Thailand	Thailand	no
Songsax	brother	Los Angeles, California	Thailand	Thailand	no
Pairote	brother	Thailand	Thailand	Thailand	no
Songyod	brother	Thailand	Thailand	Thailand	no

IF THIS APPLICATION IS BASED ON HARDSHIP TO A PARENT OR PARENTS, QUESTIONS 29 TO 32 MUST BE ANSWERED.

(29) As to such parent who is not a citizen of the United States, give date and place of arrival in the United States including full details as to manner and terms of admission to this country _____

(30) My father ☐ is ☐ is not employed. If employed, give salary and place of employment _____

(31) My mother ☐ is ☐ is not employed. If employed, give salary and place of employment _____

(32) The assets of my parents (not including clothing and household necessities) are:

Assets of father consist of the following:		Assets of mother consist of the following:	
Cash, Stocks and Bonds	$	Cash, Stocks and Bonds	$
Real Estate	$	Real Estate	$
Other (Describe)	$	Other (Describe)	$
Total	$	Total	$

(33) The following certificates or other documents are attached hereto as a part of this application: (Refer to instruction 2 for documents which must be attached.)

Nature of Document

(APPLICATION NOT TO BE SIGNED BELOW UNTIL APPLICANT APPEARS BEFORE AN IMMIGRATION JUDGE)

I do swear (affirm) that the contents of the above application, with corrections numbered (/) to ( ), and including the documents attached hereto, are true to the best of my knowledge, and that this application is now signed by me with my full, true name: So Help Me God.

x _____
(Complete and true signature of applicant or parent or guardian)

Subscribed and sworn to before me by the above-named applicant at LOS ANGELES, CALIF.

this _____ day of MAR 1 1978, 19____

_____
Immigration Judge

STATE OF CALIFORNIA

ss.

COUNTY OF LOS ANGELES

AFFIDAVIT

I, Padungsri Phinpathya, after having been duly sworn hereby depose and say:

That I am currently residing at 7515 Bellaire Avenue, North Hollywood, California 91605;

That I was born on April 10, 1948 in Samutprakarn, Thailand and am a citizen of Thailand;

That I married my husband, Niyon Phinpathya, on February 19, 1970 in Los Angeles, California;

That we have two children, Nissa and Nelson born in Los Angeles, California on September 11, 1970 and February 19, 1972 respectively and copies of their birth certificates are hereto attached;

That if I am forced to depart from the United States, I fear my American citizen children will lose their birth rights;

That my daughter Nissa is an epileptic currently receiving excellent medical care and attention from Dr. V. Vadakan, Department of Pediatrics, at Kaiser-Permanente Medical Center;

That I am extremely afraid, is we are forced to depart from the United States, I would also be forced to continue medical treatment for my child in Thailand where the medical facilities does not compare to what she is receiving in the United States;

That my husband and I have purchased a house where our entire family resides in as our home;

That my husband and I have also invested in a business enterprise known as "Premiere Coffee Shop" located at 5333 Hollywood Boulevard, Hollywood, of which I am the cook and the principal manager;

That our investment in this coffee shop has been an integral part of our support for our family;

That I am now accustomed to the American way of life after so many years and would find it difficult to return to the way of life in Thailand;

That I specially fear that my children who have never known any other way of life would be extremely affected by the abrupt change in their environment more so for my afflicted daughter;

That I have adhered to the American Constitution and have abided by its Laws;

That the radical element is now gaining control in Thailand, the government is decidedly anti-American and has forced the withdrawal of the United States military support;

That to enforce my departure from the United States would cause grave hardship physically, emotionally, mentally and financially to my children, my husband and myself;

That this affidavit is submitted in support of the Application for Suspension of Deportation filed on the basis that I have continuously lived in the United States since October 12, 1969;

That I request the Immigration & Naturalization Service to consider my Application for Suspension or Deportation and grant me permission to stay;

That I declare the foregoing statements to be true and correct and given under oath and to the best of my ability.

/s/ PADUNGSRI PHINPATHYA

PADUNGSRI PHINPATHYA

DATED: March 4, 1977.

Subscribed and sworn to before me this 4th day of March, 1977 at Beverly Hills, California.

/s/ MARIA E. PEAK,

MARIA E. PEAK,
Notary Public

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

REPORT OF INVESTIGATION

Title	File Number
(1) PHINPATHYA, Niyom (Husband)	(1) A19 063 381
(2) PHINPATHYA, Padungsri (Wife)	(2) A21 272 984

REPORT MADE AT	DATE	BY
LOS ANGELES	9/19/77	/s/ PATRICK J. WALTERS *Investigator*

SYNOPSIS

SUBJECT Niyom PHINPATHYA is a 39 year old male native and citizen of Thailand, last entered the United States as a student on 8/3/68. He is married to SUBJECT Padungsri PHINPATHYA, also a native and citizen of Thailand, 29 years of age.

Both SUBJECTS are applicants for suspension of deportation.

Investigation disclosed that SUBJECT PADUNGSRI PHINPATHYA is not eligible for suspension of deportation. Her last entry into the United States was made on 4/18/74, as the wife of a student.

Neighborhood and employment checks completed.

Police agency checks completed.

DETAILS

File A19 063 381 relates to SUBJECT NIYOM PHINPATHYA and reflects that he is a 39 year old male, native and citizen of Thailand by birth in Nakornnayok, Thailand on 12/19/38. The file further reflects that he was admitted to the United States as a student at Honolulu, Hawaii on 8/3/68, with extensions of stay granted to 7/25/71. He is currently an applicant for suspension of deportation.

File A21 272 984 relates to SUBJECT PADUNGSRI PHINPATHYA and reflects that she is a 29 year old female, native and citizen of Thailand by birth in Samutprakarn, Thailand on 4/10/48. File further reflects that she married SUBJECT NIYOM PHINPATHYA in Los Angeles California on 2/19/70 and that they have two United States citizen children.

SUBJECT PADUNGSRI PHINPATHYA'S file contains Form I-256A, Application for Suspension of Deportation which reflects her last entry into the United States as 10/11/69 at Honolulu, Hawaii as a student. The application further reflects that she has not departed from the United States, and that her I-94 is not available.

On 8/15/77 Central Office arrival and departure records were checked and reflected that SUBJECT NIYON PHINPATHYA'S last entry into the United States was on 8/3/68. Attached as Exhibit "A" are copies of his I-94 and subsequent extensions of stay.

Arrival records relating to SUBJECT PADUNGSRI PHINPATHYA reflected that she was last admitted to the United States as the wife of a student at Honolulu, Hawaii on 4/19/74. Attached as Exhibit "B" is a copy of the relating I-94.

In view of this last entry, SUBJECT PADUNGSRI PHINPATHYA is ineligible for benefits if Section 244 of the Act.

On 8/18/77 Blanca PASOS, United States citizen neighbor of SUBJECTS, was interviewed at her residence, 7511 Bellaire Avenue, North Hollywood. She stated that she has lived there for three years, that she seldom sees either

SUBJECT but that they have never caused any problems and seem to be nice people.

On the same date, Donald F. ZELLER, United States citizen neighbor, was interviewed at his residence, 7521 Bellaire Avenue. He stated that he is a retired U.S. Army Major, that he knows SUBJECTS and that they are good neighbors.

On the same date, Samuel and Catherine MAZZA, United States citizens, were interviewed at their residence, 7051 Coldwater Canyon Road, North Hollywood. They stated that they know SUBJECT personally, that SUBJECTS are good neighbors and nice people, made no derogatory statements.

On 8/30/77 Kenton PIGG, United States citizen manager, was interviewed at his place of business, Ralph's Market, 10544 Sunland Boulevard, Sunland. He stated that SUBJECT NIYOM PHINPATHYA is employed there as a produce clerk and is an excellent employee. Witness stated that SUBJECT NIYOM PHINPATHYA has been employed there for one year, but has been employed by the Ralph's Market chain for nine years.

On 9/7/77 SHERI CANTISANO, personnel clerk, was interviewed at her office, 1100 West Artesia Boulevard, Compton, Ralph's Markets Executive Center. She stated that company records relating to SUBJECT NIYOM PHINPATHYA reflect that he has been employed continuously since 6/27/69 with no breaks in employment.

On 9/12/77 RICHARD VELA, United States citizen, was interviewed at his residence at 616 North Virgil Avenue, Los Angeles, #3. He stated that SUBJECTS had lived next door to him in #4 for one year and had been good neighbors and had not caused any problems.

On the same date, the manager at 616 North Virgin, HAROLD PORTER, was interviewed at that location, #1. He stated that SUBJECTS had been excellent tenants for the two years that they had lived there, and that he had never had any complaints from anyone regarding SUBJECTS. He stated that they had moved out to buy a home.

On 9/14/77 VIRGINIA SERRANO, United States citizen owner of the apartment building located at 826 South Union

Avenue, Los Angeles was contacted at 726-2981. She stated that she had just purchased the building in June 1977, that all the tenants were new. She provided the name and address of the former owner.

On 9/14/77 PAUL RUNGE was interviewed at his residence, 2164 Hillsbury Road, Westlake Village. He stated that he had owned and lived in the building at 826 South Union Avenue, that he remembered SUBJECTS, that they had been good tenants. Witness made no derogatory statements relating to SUBJECTS.

On 9/14/77 SUBJECT PADUNGSRI PHINPATHYA was interviewed at her place of business, Premiere Coffee Shop, 5333 Hollywood Boulevard, Los Angeles. She provided a copy of their 1976 Income Tax Return, which is attached as Exhibit "C". The return reflects that her husband earned $13,581.84 in wages from Ralph's last year.

Local police agency checks completed with no record relating to SUBJECTS.

Los Angeles, Calif. 9/19/77
A19 063 381

EXHIBIT "B"

Los Angeles, Calif. | Report 9/19/77

Los Angeles, Calif. A19 063 381

Exhibit Identification Form G 166-B (1 1-54) FPI-LC-1-78-15,800-6253

Family Name (Capital Letters)	First Name	Middle Initial	
DHINPATHYA	PADUNASRI		P.513

Country of Citizenship	Passport or Alien Registration Number	Permit Number
THAILAND	C 35673	106 33 43

* United States Address (Number, Street, City and State) PACIFIC SIGHT & HEARING
116 NORTH VIRGIL AVE. L.A. CALIF. 900

* * Airline and Flight No. or Vessel of Arrival
AIR SIAM VG 602

* * Passenger Boarded at
BANGKOK THAILAND

Number, Street, City, Province or State and Country of Permanent Residence
46 [illegible] BANGKOK THAILAND

Month, Day and Year of Birth
4-10-48

City, Province (State) and Country of Birth

Visa Issued at

STAPLE HERE

Month, Day and Year Visa Issued
[illegible] 74

U.S. IMMIGRATION
170 HHW 1035
APR 18 1974
ADMITTED F-2
UNTIL JAN 30, 1975

FORM I-94 (REV. 8-1-73)

[redacted]

UNITED STATES OF AMERICA:

File No. A21 272 984

In the Matter of

Padungsuzi Phinpathya
C/O Immigration & Naturalization Service
Los Angeles, California 90012

Respondent.

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

ADDITIONAL CHARGES OF DEPORTABILITY

To: ..... (name)

..... (address)

There is hereby lodged against you the additional charge(s) that you are subject to be taken into custody and deported pursuant to the following provision(s) of law:

In support of the additional charge(s) there is submitted the following factual allegation(s) in addition to those set forth in the order to show cause and notice of hearing:

In lieu of allegations No. 3 & 4 on the Order to Show Cause, the following:

3. You entered the United States at Honolulu, Hawaii on or about April 18, 1974.

4. You were admitted as a nonimmigrant spouse of a student for a temporary period and authorized to remain in the United States until January 30, 1975.

March 1, 1978

Form I-261
(Rev. 12-15-64)

Supreme Court of the United States

No. 82-91

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER,

v.

PADUNGSRI PHINPATHYA

ORDER ALLOWING CERTIORARI. Filed November 1, 1982.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

Office - Supreme Court, U.S.
FILED
OCT 4 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-91

IN THE

Supreme Court of the United States

October Term, 1982

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

vs.

PADUNGSRI PHINPATHYA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

FRANK, GREENBERG, SIMONE & WINSTON,
BERT D. GREENBERG,
MARTIN SIMONE,
DANIEL G. GOLD,
8484 Wilshire Boulevard,
Suite 730,
Beverly Hills, Calif. 90211,
(213) 655-4900,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Cases — Page

Heitland v. INS, 551 F.2d 495, cert. denied, 434 U.S. 819 (1977) 5, 6, 7

Kamheangpatiyooth v. INS, 597 F.2d 1253 (9th Cir. 1979) 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13

McColvin v. INS, 648 F.2d 935 (4th Cir. 1981) 2, 3, 7, 8

Rosenberg v. Fleuti, 374 U.S. 449 (1963) 3, 6, 7, 8, 9, 10, 12

Wadman v. INS, 329 F.2d 812 (9th Cir. 1964) 3, 6, 8, 13

Miscellaneous

S. Rep. No. 1204, 80th Cong., 2d Sess. (1948) 4

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No. 82-91

IN THE

Supreme Court of the United States

October Term, 1982

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

vs.

PADUNGSRI PHINPATHYA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

REASONS FOR DENYING WRIT.

Petitioner's Petition for Writ of Certiorari should be denied for the following reasons:

As to the Respondent the Issue Presented Is Moot.

As to the Respondent, Padungsri Phinpathya, the issue has become moot. The issue involved is whether Respondent has satisfied the requirement of 8 U.S.C. §1254(a)(1) of having ". . . been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application . . ." Assuming, for the sake of this argument only, that Respondent's period of continuous physical presence in the United States began on April 18, 1974, upon her return from her brief absence she has, since that date, completed in excess of the seven year continuous physical presence requirement

of the statute. Respondent could, at this time, apply to have her deportation hearing reopened in order to file a new application for suspension of deportation, alleging a new seven year continuous physical presence dating from April 18, 1974, a period of over eight years. Since Respondent could, without any determination by this Court of the merit of Petitioner's Petition, clearly meet the statutory requirement of 8 U.S.C. §1254(a)(1), this Court should deny the Petition on the basis that the issue, as to Respondent, is moot.

Petitioner Has Misstated the Congressional Intent in That the Remedy of Suspension of Deportation Should Be "Generously Construed."

Petitioner, in its Petition for Writ of Certiorari, has misstated the Congressional intent in providing the statutory remedy of suspension of deportation. Petitioner states that the decision below, as well as the court's decision in *Kamheangpatiyooth v. INS*, 597 F.2d 1253 (9th Cir. 1979) were

> ". . . based on the erroneous assumption that Congress intended Section 244(a)(1) [8 U.S.C. §1254(a)(1)] 'to be generously construed.' " (Petitioner's Brief, p. 10).

Respondent submits that these two Ninth Circuit cases correctly identify the intent of Congress in enacting 8 U.S.C. §1254(a)(1), and that Petitioner's position, that Congress intended a narrow and strict interpretation of the statute, is incorrect and not based on sound authority.

Petitioner cites *McColvin v. INS*, 648 F.2d 935 (4th Cir. 1981) for the proposition that on its face 8 U.S.C. §1254(a)(1)

> "contains no exception to the requirement of seven years of 'continuous physical presence' in the United States to be eligible for suspension of deportation," 648 F.2d at 937,

and that Congress intended that the continuous physical presence requirement ". . . be applied in a rigorous manner," 648 F.2d at 938. In fact, however, the court did not make its decision based on that *dicta*, but rather held that the alien was not eligible for 8 U.S.C. §1254(a)(1) relief under the Ninth Circuit *Kamheangpatiyooth* formulation of the statute. The court further stated that since this Court's decision in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), and the Ninth Circuit decision in *Wadman v. INS*, 329 F.2d 812 (9th Cir. 1964), the word "continuous" has not been subject to a "hard and fast construction." 648 F.2d at 937. The court went on to allow that

> "The parties in the present case agree that the continuous physical presence requirement may be relaxed in an appropriate case. They differ, however, on the degree of relaxation that should be allowed and on whether this case is an appropriate one for such relaxation." 648 F.2d at 937.

At most, the court's decision in *McColvin v. INS, supra*, can be cited for the proposition that the specific facts of that case did not make it an appropriate case in which to relax the continuous physical presence requirement.

Respondent submits that the Ninth Circuit has more accurately adhered to the Congressional intention in creating 8 U.S.C. §1254(a)(1). In discussing the suspension of deportation statute in conjunction with 8 U.S.C. §1101(a)(13), the court stated in *Kamheangpatiyooth v. INS, supra:*

> "Both sections therefore must be interpreted in light of the congressional purpose. Both sections are remedial, and hence are to be generously construed. More specifically, both sections are intended to relieve aliens of the harsh results, and of the unsuspected risks and unintended consequences, that would flow from a literal and rigid application of the provisions of the

> Act relating to expulsion and exclusion." 597 F.2d at 1256.

The legislative history shows that Congress' intention in enacting the suspension of deportation statute was remedial in nature and meant to ameliorate the hardships of deportation.

> "It is the information of the committee that there are a number of worthy cases in which persons, deportable on technical grounds, have lived in the United States for many years, but have no close family ties so as to enable them to become eligible for discretionary relief. . . . It is only just that other persons in this category who have not been favored by the introduction of private bills should have their cases considered for relief." S. Rep. No. 1204, 80th Cong., 2d Sess. (1948).

And prior to the amendment of the Immigration and Nationality Act in 1948, which extended suspension of deportation to aliens who had seven or more years residence in the United States, "Immigration and Naturalization Service officials stated that the law was too stringent. . . ." S. Rep. No. 1515, 81st Cong., 2d Sess. (1950).

Petitioner argues that Congress must have intended the seven year continuous physical presence requirement to be interpreted narrowly because of the exceptional nature of the suspension remedy. However, as was pointed out by the court in *Kamheangpatiyooth*, a liberal interpretation of the continuous physical presence requirement would not result in a reduction of the exceptional quality of the remedy.

> "A generous construction of the continuous presence requirement of §244(a)(1) [8 U.S.C. §1254(a)(1)] is also especially appropriate because it will not require relief to be granted where relief may be unwarranted. Indeed, a liberal construction will not require the grant-

ing of relief in any case; it will only allow the Attorney General to review the case on the merits and to decide whether in his discretion relief in fact would be warranted." 597 F.2d at 1256, footnote 3.

The fact that an alien may meet the seven year continuous physical presence requirement is by no means determinative of the suspension application. To the contrary, the alien must demonstrate good moral character and make the showing that deportation would result in "extreme hardship." It is this latter requirement which characterizes the suspension remedy as an exceptional remedy. A liberal interpretation of the continuous physical presence requirement would not denigrate the exceptional quality of the suspension of deportation regulation.

A generous interpretation of the seven year continuous physical presence requirement of 8 U.S.C. §1254(a)(1) as adopted by the Ninth Circuit accurately complements the intention of Congress in enacting the suspension of deportation remedy.

The Decision Below Is Not in Conflict With the Decisions in Other Circuits in That Each Circuit Has Applied the Same Test of Significant Interruption to Decide Each Case on Its Individual Facts.

The decision of the court below is not in conflict with decisions of the other Courts of Appeals that have considered the issue of significant interruption of the continuous physical presence requirement.

Petitioner asserts that the decision below is in conflict with the Second Circuit's decision in *Heitland v. INS*, 551 F.2d 495, cert. denied, 434 U.S. 819 (1977). Although opposite results are reached in the two cases involving substantially similar facts, the fact is that both courts applied the same law but reached opposite conclusions based on the

specific facts of each case. The *Heitland* court correctly stated the applicable case law which holds that the alien must show that any departure during the statutory seven year period did not meaningfully interrupt his continuous physical presence in the United States. See *Rosenberg v. Fleuti, supra*, and *Wadman v. INS, supra*.

> ". . . the issue turns on the significance of that absence and on whether the Heitlands sustained their burden (citation omitted), of proving that it did not meaningfully interrupt the continuity of their presence." 551 F.2d at 500.

This is the same test used by the court below in reaching its decision.

While it is true that the *Heitland* court applied the same three factors which this Court used in *Rosenberg v. Fleuti, supra*, to determine the significance of the departure; namely, whether the departure was innocent, casual and brief, it was not required to do so by this Court's holding in that case. This Court in *Rosenberg v. Fleuti, supra*, held only than an innocent, casual and brief excursion by a resident alien did not interrupt his resident status. This Court stated that these are relevant factors, but did not conclude that they were determinative nor exclude the possibility that other factors might be just as relevant in determining the significance of the departure.

The court below applied the same *Fleuti* test, but concluded that, based on the facts of the case, factors other than the "innocent, casual and brief" factors were more relevant to the significance of the alien's departure. The Ninth Circuit held only that in light of the fact that the hardship which the alien would suffer upon deportation was undiminished by the departure, that the departure could not be considered significantly interruptive of the seven year period. Nothing in *Rosenberg v. Fleuti, supra*, precluded

the court from using such a factor in determining the significance of the departure. Thus, the court below applied the same law as did the Second Circuit in *Heitland v. INS, supra*, finding only that different factors present in the alien's case were determinative of the significance of the departure.

Respondent finds support for its position in Judge Kaufman's dissent in *Heitland*, who would hold on the facts presented in that case, that the Heitlands' departure did not meaningfully interrupt their seven year presence. Apparently he would have used factors more relevant than the majority's rigid application of the "innocent, casual and brief" factors used by this Court in *Rosenberg v. Fleuti, supra*.

Petitioner also states that the decision below is in conflict with the Fourth Circuit's decision in *McColvin v. INS*, 648 F. 2d 935 (4th Cir. 1981). Although the *McColvin* court states that it believes Congress intended a restrictive interpretation of the seven year continuous physical presence requirement, it nevertheless decided the case based on the factors enunciated by the Ninth Circuit in *Kamheangpatiyooth*. The *McColvin* court held that the alien's departure, because it was a statutory voluntary departure in lieu of actual deportation, was sufficiently significant to interrupt the alien's continuous presence. Applying the first *Kamheangpatiyooth* test, the court held that the hardship would be diminished by the departure, since the alien had accepted the grant of voluntary departure and, therefore, should not have harbored any expectations of returning to continue an uninterrupted residence in the United States. Applying the second *Kamheangpatiyooth* test, the court found that there was a significant increase in the likelihood of deportation, since, had the alien not left of his own accord, he would have been forcefully deported by the Immigration and Nat-

uralization Service. Regardless of its *dicta* to the contrary, the Fourth Circuit decided *McColvin* using the Ninth Circuit formulation found in *Kamheangpatiyooth*. Petitioner's argument that the holding of the Courts of Appeals in the different circuits deciding the issue of continuous physical presence are in conflict is spurious.

The Ninth Circuit in Its Decisions on the Issue of "Significant Interruption" Is Not in Conflict With the Decision of the Supreme Court in *Rosenberg v. Fleuti, Supra*, on the Same Issue in That This Court Did Not Intend That Any Subsequent Court Be Limited Solely to the Factor Enumerated in *Fleuti*.

The decisions of the Ninth Circuit in *Kamheangpatiyooth v. INS, supra*, and in this case below are not in conflict with this Court's decision in *Rosenberg v. Fleuti, supra*.

Petitioner correctly states that since the Ninth Circuit's decision in *Wadman v. INS, supra*, the principles laid down by this Court in *Rosenberg v. Fleuti, supra*, have been applied to the continuous physical presence requirement of 8 U.S.C. §1254(a)(1). In *Wadman*, the Ninth Circuit stated that

> "The question is whether the interruption, viewed in balance with its consequences, can be said to have been a significant one under the guides laid down in Fleuti." 329 F.2d at 816.

As has been discussed, *infra*, the holding of this Court in *Rosenberg v. Fleuti, supra*, was not that the three factors found to be relevant in that case be rigidly applied to all subsequent cases. Rather, this Court held that the ultimate test is whether the departure can be ". . . regarded as meaningfully interruptive . . ." 374 U.S. at 462.

Under the facts of the *Fleuti* case, this Court stated that the relevant factors to be considered to determine whether

the alien's departure was meaningfully interruptive were the length of time the alien was absent from the United States, the purpose of the departure, and whether travel documents were procured. This Court concluded by clarifying that these factors would not operate in all cases, and that factors other than these three would be the relevant factors in other cases.

> "Although the operation of these and other possibly relevant factors remains to be developed 'by the gradual process of judicial inclusion and exclusion', (citation omitted), we declare today simply that an innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been 'intended' as a departure disruptive of his resident alien status . . ." 374 U.S. at 462.

Clearly, this Court did not intend, by its decision in *Fleuti*, to enumerate the only factors which may be considered in determining whether a departure is "meaningfully interruptive".

The Ninth Circuit, in *Kamheangpatiyooth*, correctly identified the function of the seven year continuous physical presence requirement of 8 U.S.C. §1254(a)(1):

> "It was Congress's judgment that presence of that length was likely to give rise to a sufficient commitment to this society through establishment of roots and development of plans and expectations for the future to justify an examination by the Attorney General of the circumstances of the particular case to determine whether deportation would be unduly harsh [footnote omitted]." 597 F.2d at 1256.

Concerning departures during the seven year period such as the one which is at issue in this case, the court further stated,

> ". . . interruptions that are brief and infrequent *do not diminish the probability that deportation would oc-*

> *casion undue hardship*. An alien who leaves the country briefly and for innocent reasons during the requisite seven years *may be in no different position*, realistically viewed, than an alien who has remained within the borders for an identical period." 597 F.2d at 1257 [emphasis added].

In view of the remedial purpose of 8 U.S.C. §1254(a)(1) to ameliorate the hardship of deportation in appropriate cases, and the purpose for the inclusion of the seven year physical presence requirement to assure that the alien has established sufficient roots, the *Kamheangpatiyooth* court determined that one very relevant factor to be considered in this context is

> ". . . whether a particular absence during the seven year period reduced the significance of the whole period as reflective of the hardship and unexpectedness of expulsion." 597 F.2d at 1257.

Nothing in this formulation of the "meaningfully interruptive" standard is in conflict with this Court's holding in *Fleuti*. Nor does the court's decision in this case below conflict with this Court's decision in *Fleuti;* it merely applied the *Kamheangpatiyooth* test regarding the evidentiary factors to be considered in determining the significance of the alien's departure to the facts of this case.

The Issue for Which Petitioner Seeks Review Is Not the Holding of the Court Below.

The issue for which Petitioner seeks review by this Court is not properly presented by the holding of the Ninth Circuit decision in the case below. Petitioner, by its Petition for Writ of Certiorari, in fact desires this Court to review the Ninth Circuit's decision in ***Kamheangpatiyooth*** *v.* ***INS***, *supra*, which is not before the court at this time.

Petitioner seeks review of the *Kamheangpatiyooth* decision, insofar as it held that an absence could not be significantly disruptive of the seven year continuous physical presence if ". . . indications are that the hardship of deportation to the alien would be equally severe had the absence not occurred . . ." 597 F.2d at 1257. Although the court below cited *Kamheangpatiyooth v. INS, supra,* and adopted its analysis of the continuous physical presence requirement, it can not be said that the court below held that that one factor by itself is determinative of the significance of the departure.

Rather, the decision of the court below was to reverse the decision of the Board of Immigration Appeals ["BIA"] and remand the case for further consideration because the BIA had considered only one factor in its determination that the alien's absence was meaningfully interruptive of her continuous physical presence. The BIA had made its determination solely on the basis of a finding that the alien had, by her departure, substantially increased the likelihood of deportation. This factor is only one of the relevant factors to be considered according to the *Kamheangpatiyooth* decision. In the instant case, the court below stated that the correct application of the *Kamheangpatiyooth* decision is

> ". . . to view the circumstances in their totality, and analyze those circumstances in light of the Congressional purpose underlying the continuity requirement." (Petitioner's App. A, p. 6a.).

Further, the court stated that,

> "By relying exclusively on the fact that Mrs. Phinpathya increased her risk of deportation by her absence, the BIA treated that factors [sic] as 'the object of the inquiry', and failed to view the circumstances in their totality and in light of the underlying Congressional purpose." (Petitioner's App. A, p. 7a).

The holding of the court below is that the Board of Immigration Appeals used an "erroneous standard" in determining the significance of the alien's departure in that it relied on one factor and one factor only in its determination. The correct standard, according to the court, and which is in no way in conflict with this Court's decision in *Fleuti*, is that all relevant circumstances should be viewed in their totality and with the underlying Congressional purpose in mind. The court below did not hold, as Petitioner asserts, that an alien's absence may never be considered meaningfully interruptive of the seven year continuous physical presence requirement if the hardships associated with the alien's departure would be as severe as if the absence had not occurred. Petitioner's request to have the Ninth Circuit's decision in *Kamheangpativooth v. INS, supra*, reviewed by way of a Writ of Certiorari in this case, should not be granted.

The Question Presented by Petitioner Is Not of Sufficient Public Importance in the Context of Suspension of Deportation to Warrant Review by the Supreme Court.

The issue presented by Petitioner in its Petition for Writ of Certiorari is not of sufficient public importance to warrant review by this Court. In the suspension of deportation context [8 U.S.C. §1254(a)(1)], the issue is rarely a decisive one, as the vast majority of suspension cases are denied based on the failure of the alien to establish to the satisfaction of the Attorney General that his deportation would result in extreme hardship.

While it is true that seven years continuous physical presence is a statutory requirement which must be met before the alien's case may be further considered for the exceptional remedy of suspension of deportation, allowing questionable

cases to be resolved in favor of the alien in no way reduces the exceptional nature of the remedy, see *Wadman v. INS*, 329 F.2d at 817, and *Kamheangpatiyooth v. INS*, 597 F.2d at 1256 footnote 3, since the Attorney General must still determine whether deportation would result in extreme hardship. This last requirement is the heart of the suspension of deportation remedy, and that which insures that suspension will be granted in only truly exceptional and deserving cases.

The public interest is not served by this Court's review of an issue which is rarely determinative of applications for relief under 8 U.S.C. §1254(a)(1). If, as Petitioner asserts, this issue is of sufficient importance in that it will cause ". . . substantial repercussions beyond the suspension of deportation context," (Petitioner's Brief, p. 9), Respondent suggests that the issue be reviewed in a different context where the issue is significant to the final determination of the entire case.

Conclusion.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

FRANK, GREENBERG, SIMONE & WINSTON,
BERT D. GREENBERG,
MARTIN SIMONE,
DANIEL G. GOLD,
Attorneys for Respondent.

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IMMIGRATION AND NATURALIZATION SERVICE,

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Respondent.

MOTION TO ENLARGE RECORD, SUGGESTION OF MOOTNESS AND MOTION TO STAY FURTHER PROCEEDINGS PENDING ADMINISTRATIVE ACTION.

FRANK, GREENBERG, SIMONE & WINSTON,
BERT D. GREENBERG,
MARTIN SIMONE,
DANIEL G. GOLD,
8484 Wilshire Boulevard,
Suite 730,
Beverly Hills, Calif. 90211,
(213) 655-4900,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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MOTION TO ENLARGE RECORD, SUGGESTION OF MOOTNESS AND MOTION TO STAY FURTHER PROCEEDINGS PENDING ADMINISTRATIVE ACTION.

Respondent respectfully files this above-captioned document to inform the Court of certain important facts recent occurrence, to suggest that this cause may be moot as a result of said facts, and to request that further action of this Court be stayed pending the completion of administrative proceedings which are pending at the Board of Immigration Appeals.

I.

CERTAIN NEW FACTS SHOULD BE BROUGHT TO THE COURT'S ATTENTION AND INCLUDED IN THE RECORD.

Respondent is aware of the prohibition against referring to facts outside of the record of the proceedings below. However, in cases where new circumstances exist which

may alter the ultimate resolution of the controversy underlying the cause before this Court, it is appropriate to include the facts surrounding such circumstances in the record of this Court. *Fusari v. Steinberg*, 419 U.S. 379 (1975).

Believing that it has a duty to do so pursuant to *Fusari v. Steinberg, supra*, respondent wishes to advise the Court of the following facts:

On February 3, 1983, respondent herein filed, with the Board of Immigration Appeals, a Motion to Reopen her deportation hearing, pursuant to 8 C.F.R. § 3.2 and 8 C.F.R. § 3.8. Said motion was accompanied by an Application for Suspension of Deportation, Immigration Form 1-256A and accompanying documents. Copies of the Motion to Reopen, Application for Suspension of Deportation, and accompanying documents have been lodged with the clerk of this Court.

The motion to reopen and application allege that respondent is statutorily eligible for the relief of suspension of deportation under Section 244 of the Immigration and Nationality Act, 8 U.S.C. § 1254(a)(1), based on a new and material fact which has developed since respondent's last deportation hearing which was conducted on November 13, 1978. Because of the existence of a new and material fact, the motion to reopen is appropriate under 8 C.F.R. § 3.2 and 8 C.F.R. § 3.8.

The new and material fact presented to be proved at the deportation hearing, when reopened, is the continuous uninterrupted physical presence of the respondent in the United States since April 18, 1974, a period in excess of eight years in length.

Respondent alleges in her application and supporting documents and will prove at her reopened deportation hearing, that she has made no departures whatsoever since her last

arrival in the United States on April 18, 1974. Further, respondent alleges that she has been a person of good moral character and that she and her United States citizen children would suffer extreme hardship if she were deported from the United States.

On the basis of the above stated facts, respondent hereby moves this Court to enlarge the record of this case by including within it the above mentioned Motion to Reopen filed with the Board of Immigration Appeals and the accompanying Application for Suspension of Deportation and documents attached thereto.

II.

THE CAUSE PENDING BEFORE THIS COURT MAY BE MOOT.

This Court has succinctly examined the mootness doctrine in *North Carolina v. Rice*, 204 U.S. 244, 246 (1971), wherein it stated:

> ". . . [R]esolution of the question [of mootness] is essential if federal courts are to function within their constitutional sphere of authority. Early in its history, this Court held that it had no power to issue advisory opinions, *Hayburn's Case*, 2 Dall. 409 (1792), as interpreted in *Muskrat v. United States*, 219 U.S. 346, 351-353 (1911), and it has frequently repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them. *Oil Workers Unions v. Missouri*, 361 U.S. 363, 367 (1960). To be cognizable in a federal court, a suit 'must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241 (1937). However, '[m]oot ques-

tions require no answer.' *Missouri, Kansas & Texas R. Co. v. Ferris*, 179 U.S. 602, 606 (1900). Mootness is a jurisdictional question because the Court 'is not empowered to decide moot questions or abstract propositions,' *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920), quoting *California v. San Pablo & Tulare R. Co.*, 149 U.S. 308, 314 (1893); our impotence 'to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.' *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n. 3 (1964)"

The Article III case or controversy concept requires that an actual controversy must be extant at all stages of appellate or certiorari review and not just when the action is initiated. For that reason, the issue of mootness can be raised at any time, even for the first time, at the Supreme Court level. *DeFunis v. Odegard*, 416 U.S. 312 (1974).

Review by this Court was sought by the Immigration and Naturalization Service of one issue only. The Immigration and Naturalization Service seeks review of the finding of the United States Court of Appeals for the Ninth Circuit that respondent has satisfied the seven years continuous physical presence requirement of the Immigration and Nationality Act, Section 244, 8 U.S.C. § 1254(a)(1).

The Immigration and Nationality Act, Section 244, 8 U.S.C. § 1254(a)(1) provides for application for suspension of deportation of a deportable alien who "[1] has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, . . . [2] proves that during all such period he was and is a person of good moral character; and [3] is a person whose deportation would, in the opinion of the Attorney General result in extreme hardship to the

alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. . . ."

The Immigration Judge and the Court of Appeals both concluded that respondent satisfied the good moral character and extreme hardship requirements of 8 U.S.C. § 1254(a)(1), and the Immigration and Naturalization Service has not challenged those findings. Only respondent's fulfillment of the seven years continuous physical presence requirement is challenged.

As is clear from the record below, the issue focuses around whether respondent's departure in early 1974 was "meaningfully interruptive" of her continuous physical presence in the United States dating from October, 1969.

In light of the new facts presented in Section I above, that respondent can now prove a new seven year period of continuous physical presence in the United States which has been uninterrupted since April, 1974, and has moved the Board of Immigration Appeals to reopen her deportation hearing on the basis that she has now unquestionably satisfied all three of the statutory requirements of 8 U.S.C. § 1254(a)(1), a decision of this Court of the issue before it may not be necessary to the final disposition of respondent's deportation case.

Assuming that the Board of Immigration Appeals reopens respondent's case and that she proves the facts alleged in her application at the reopened hearing, respondent's deportation could be suspended under 8 U.S.C. § 1254(a)(1). Because of the development of these new circumstances, respondent's deportation may be suspended regardless of this Court's decision on the issue of whether her departure in 1974 was meaningfully interruptive of her earlier claimed seven year physical presence. Since this Court's decision

on the only issue before it may not be finally dispositive of respondent's deportation case, the issue for which the Immigration and Naturalization Service has sought review may be a moot question. Because the final resolution of respondent's deportation case may be reached notwithstanding a decision of this Court on the only issue before it, respondent suggests that this Court consider that it may, depending upon the decision of the Board of Immigration Appeals, lack jurisdiction to hear this cause under the doctrine of mootness.

Defunis v. Odegard, supra, involved the question of mootness in circumstances analogous to the instant case. Defunis, a law school student, had challenged the constitutionality of the law school's admissions policy, and the trial court ordered him admitted to the school. On appeal, the Washington State Supreme Court reversed and DeFunis sought Certiorari in this Court. Pending determination by the Court, Mr. Justice Douglas stayed the judgment of the State Supreme Court with the result that Defunis was in his last semester of law school when his case reached this Court. Additionally, the law school had made assurances that regardless of the outcome of the case in this Court, DeFunis would be allowed to finish law school.

This Court concluded that:

> "Because the petitioner will complete his law school studies at the end of the term for which he has now registered regardless of any decision this Court might reach on the merits of this litigation, we conclude that the Court cannot, consistently with the limitations of Art. III of the Constitution, consider the substantive constitutional issues tendered by the parties." 416 U.S. at 320.

Such was the holding of this Court notwithstanding the suggestion by dissenting justices that any number of un-

expected events might preclude DeFunis' graduation at the scheduled time.

In Footnote 5 the Court stated:

> " 'But such speculative contingencies afford no basis for our passing on the substantive issues [the petitioner] would have us decide,' *Hall v. Beals*, 396 U.S. 45, 49 (1969), in the absence of 'evidence that this is a prospect of "immediacy and reality." ' *Golden v. Zwickler*, 394 U.S. 103, 109 (1969); *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)."
>
> *DeFunis v. Odegard, supra*, at 320, note 5.

Since respondent herein may have her deportation suspended "regardless of any decision this Court might reach on the merits of this litigation"; *DeFunis v. Odegard, supra*, at 319, respondent urges that this Court consider the mootness issue in determining the appropriateness of granting a stay as requested in Section III, below.

III.

RESPONDENT REQUESTS A STAY OF FURTHER PROCEEDINGS IN THIS COURT PENDING FINAL DETERMINATION OF RESPONDENT'S MOTION TO REOPEN DEPORTATION PROCEEDINGS PENDING BEFORE THE BOARD OF IMMIGRATION APPEALS.

> "On occasion a petition for Certiorari may be held, without the Court taking any action, until some event takes place which will aid or control the determination of the matter . . . . [It may be held] until some anticipated event occurs which may make the case moot. Such postponement may come about on motion of a party (see *Murray v. City of New York*, 308 U.S. 528, 310 U.S. 610, 311 U.S. 720) or on the Court's own motion." Robert L. Stein, Eugene Gressman, *Supreme Court Practice*, at 360 (5th ed. 1978).

While the petition for Writ of Certiorari has already been granted in the present case, the reasoning of the above authorities has no less import to procedures during pendancy of Certiorari proceedings; it would be appropriate for the Court to exercise its power to issue a stay, either at the request of a party or upon its own motion, when to do otherwise would waste valuable time, energy and resources, and would ultimately result in a decision in excess of the Court's jurisdiction.

The development of new circumstances detailed in Section I above suggests that the issue for which review in this Court was sought may well be or become moot prior to a decision by this Court by reason of a decision by the Board of Immigration Appeals as discussed in Sections I and II above. If the issue is or becomes moot this Court would be devoid of Article III jurisdiction to hear the case and any further proceedings before this Court would simply be an inexpeditious use of the Court's time, with no ultimate effect on the controversy or the parties before the Court.

A stay of the type requested is appropriate because of the prejudice and hardship which would be encountered by the government, the alien and the courts if the stay is not granted. The prejudice to the government and the respondent is based on their duty to respectively prosecute and defend the case simultaneously on two fronts, namely in the Supreme Court in the instant case and also at the Board of Immigration Appeals even though a decision by the latter may preclude the necessity of a decision by the former. In addition, should this Court decide adversely to the respondent, respondent would have to seek a stay of deportation or possibly a Writ of Habeas Corpus pending the decision of the Board of Immigration Appeals.

The prejudice to the Court accrues whether its decision precedes or is subsequent to the decision of the Board of

Immigration Appeals. If the Board of Immigration Appeals' decision is first and is in respondent's favor, judicial energy will have been wasted on a moot case. Even if this Court decides first, the integrity of the Court's decision may be compromised by a later Board of Immigration Appeals decision which is controlling of respondent's actual deportation *vel non*; the controversy will not be settled until the administrative proceedings with the Board of Immigration Appeals are exhausted. This is one of the reasons for the rule requiring exhaustion of administrative remedies prior to resort to the judicial system.

On the other hand, a stay will prejudice no party's ability to proceed with the present case in this Court at a later date should the case not be rendered moot by a decision of the Board of Immigration Appeals.

The arguments expressed above are even more compelling considering the substantial likelihood of respondent prevailing at the Board of Immigration Appeals. Based upon the tripartite analysis of the factual circumstances mandated by statute (seven years continuous physical presence, good moral character, and extreme hardship) the immigration judge at the trial level found only the seven year requirement lacking. The Court of Appeals for the Ninth Circuit agreed that good moral character and extreme hardship had been established and held that the seven year requirement had also been met. The government appealed the Ninth Circuit's ruling on the seven year issue contending that the departure and return in 1974 had meaningfully interrupted the required continuous presence. Resolving that issue is the purpose of the instant case.

However, in the meantime the seven year continuous physical presence requirement has been satisfied in full with no interruptions since 1974. Coupled with the previously

established and unchallenged good moral character and extreme hardship, this factor leads respondent to believe that she will likely prevail at the Board of Immigration Appeals.

IV.
CONCLUSION.

Based upon the mootness doctrine, the concomitant jurisdictional issue, considerations of judicial economy, and the absence of prejudice to any party, as discussed above, respondent respectfully requests this Court:

(a) to enlarge the record in the instant case to include respondent's Motion to Reopen, Application for Suspension of Deportation with its supporting documents and the facts contained therein, filed and now pending with the Board of Immigration Appeals; and

(b) to stay further briefing and all further proceedings in this case pending the final decision of the Board of Immigration Appeals in respondent's deportation case.

Respectfully submitted,

FRANK, GREENBERG, SIMONE &
WINSTON,
BERT D. GREENBERG,
MARTIN SIMONE,
DANIEL G. GOLD,
Attorneys for Respondent.

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No. 82-91

In the Supreme Court of the United States

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

PADUNGSRI PHINPATHYA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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---

1. Respondent contends (Br. in Opp. 1-2) that the case is moot. She asserts that since her return from Thailand in April 1974, she has been physically present in the United States for a continuous period of more than seven years. On the basis of this assertion, respondent claims that she could now move to reopen her deportation proceeding in order to file a new application for suspension of deportation. Accordingly, respondent argues, there is no reason for this Court to grant the petition because even if the Court were to reverse the judgment of the court of appeals, respondent would nonetheless be able to satisfy the "continuous physical presence" requirement of Section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1254(a)(1).

Respondent's contention is manifestly without merit for a number of reasons. To begin with, the case is clearly not moot because respondent has not yet even filed a new application for suspension of deportation with the Board of Immigration Appeals, much less been found by the BIA to have satisfied the "continuous physical presence" requirement. In addition, while it is of course true that more than seven years have elapsed since respondent's April 1974 entry, we have no way of knowing whether respondent could sustain her statutory burden of demonstrating that she has been physically present in the United States for a continuous period of at least seven years. Certainly, nothing in the record of this case provides a basis for concluding that respondent could meet this burden, and counsel's unsupported assertions in the brief in opposition similarly do not establish that respondent could satisfy the "continuous physical presence" requirement.

Moreover, nothing in either the Immigration and Nationality Act or the regulations promulgated by the INS automatically entitles respondent to reopen her deportation proceeding for the purpose of filing yet another application for suspension of deportation. The Act itself does not expressly provide for a motion to reopen. The pertinent INS regulation, 8 C.F.R. 3.2, provides in relevant part that "[m]otions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material * * *." As the Court observed in *INS* v. *Wang*, 450 U.S. 139, 144 n.5 (1981), "the regulations may be construed to provide the Board with discretion in determining under what circumstances proceedings should be reopened." The Court in *Wang* quoted approvingly from the dissenting opinion in *Villena* v. *INS*, 622 F.2d 1352, 1362 (9th Cir. 1980) (en banc), in which Judge Wallace concluded that the INS had discretion beyond requiring proof of a prima facie case:

> If INS discretion is to mean anything, it must be that the INS has some latitude in deciding when to reopen a case. The INS should have the right to be restrictive. Granting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case. It will also waste the time and efforts of immigration judges called upon to preside at hearings automatically required by the prima facie allegations.

Under this approach, even if respondent were to file a motion to reopen, the INS clearly would be acting well within its discretion if it were to deny such a motion on the ground that the period after a finding of deportability should not be counted toward the statutory seven-year period. The INS is not required to permit deportable aliens, as a matter of course, to reopen deportation proceedings merely because they have demonstrated "'the ability to stay out of trouble with the police for seven years.'" *INS* v. *Wang*, *supra*, 450 U.S. at 145, quoting from *Wang* v. *INS*, 622 F.2d 1341, 1352 (9th Cir. 1980) (en banc) (Goodwin, J., dissenting). This is especially true when part of the seven-year period includes the time *following* a finding of deportability; otherwise, deportable aliens with access to legal services will have every incentive to attempt to prolong their illegal stays in this country through dilatory tactics and legal maneuvers in proceedings before the courts and the INS.

2. Respondent asserts (Br. in Opp. 2-5) that Congress intended the "continuous physical presence" requirement in Section 244(a)(1) to be "generously construed." But respondent points to nothing in the language, structure or history of the statute that supports her assertion. On the contrary, the legislative history to which respondent refers (Br. in Opp. 4) merely shows that Congress sought to make the discretionary

relief of suspension of deportation available to certain aliens who were not previously eligible for such relief. It does not show that Congress intended the courts to disregard the eligibility requirements set forth in the statute.

Respondent's argument illustrates the problem with the court of appeals' approach in this area: having started from the premise that the statute is to be "generously construed," the court proceeded to expand its interpretation of the statute in successive cases until the actual language of the statute has become largely irrelevant to the result reached in any given case. One does not have to subscribe to the view that the "continuous physical presence" language of Section 244(a)(1) was meant to be interpreted literally in order to conclude that the court of appeals has simply gone too far in holding that an alien such as respondent, who left the United States for *three months* and misrepresented her status in order to secure reentry into this country, has met the "continuous physical presence" requirement of the statute.

Respondent argues (Br. in Opp. 4-5) that a liberal interpretation of the "continuous physical presence" requirement would not detract from the exceptional nature of the suspension of deportation remedy because the alien must still satisfy the "good moral character" and "extreme hardship" requirements of the statute. Of course, the same argument could be made, in turn, with respect to each of the other statutory requirements.[1] Respondent also contends that a generous construction of the statute is appropriate because it will not require the granting of relief, which is within the Attorney

[1] In fact, as we noted in our petition (at 6 n.4), the erroneous approach of the court of appeals on the "continuous physical presence" issue is also reflected in its reversal of the determinations of the Board of Immigration Appeals on the "good moral character" and "extreme hardship" issues.

General's discretion. But Congress explicitly provided that the Attorney General need not exercise his discretion, and indeed does not even have authority to grant a suspension of deportation, unless the alien satisfies the statutory eligibility requirements. Unless Congress' dictates are to be ignored, the eligibility requirements must be given a more rigorous interpretation than that accorded by the court of appeals.

3. Respondent errs in asserting (Br. in Opp. 8-10) that the decision below is consistent with this Court's decision in *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963).[2] The Court in *Fleuti* held that a resident alien's departure is not to be regarded as "intended" within the meaning of 8 U.S.C. 1101(a)(13) if it was innocent, casual and brief, and thus not "meaningfully interruptive" of the alien's permanent residence. This construction, the Court concluded, "protects the resident alien from unsuspected risks and unintended consequences of such a wholly innocent action." 374 U.S. at 462.

In this case, the court of appeals considered whether respondent's trip abroad was "meaningfully interruptive" of her continuous physical presence in the United

[2] Although respondent claims (Br. in Opp. 5) that the decision below does not conflict with the Second Circuit's decision in *Heitland* v. *INS*, 551 F.2d 495, cert. denied, 434 U.S. 819 (1977), she concedes that the courts in the two cases reached "opposite results" on "substantially similar facts." Similarly, while respondent asserts that the court of appeals' decision here is not inconsistent with the Fourth Circuit's decision in *McColvin* v. *INS*, 648 F.2d 935 (1981), she acknowledges (Br. in Opp. 7) that the court in *McColvin* concluded that "Congress intended a restrictive interpretation of the seven year continuous physical presence requirement." Given the Fourth Circuit's view of congressional intent, which led it to conclude that a *one-day* departure rendered an alien ineligible for suspension of deportation, it is difficult, if not impossible, to believe that if this case had arisen in that circuit, respondent would have been found to have satisfied the "continuous physical presence" requirement of Section 244(a)(1).

States. Respondent's trip abroad was not "brief"; unlike Fleuti, whose visit to Mexico consumed "'about a couple of hours'" (374 U.S. at 461), respondent travelled to Thailand for three months. Nor was respondent's trip "casual"; unlike Fleuti, respondent obtained a passport before leaving the United States. Finally, respondent's actions were not "wholly innocent," because she misrepresented her status in order to secure reentry into this country. Under the standards enunciated in *Fleuti*, therefore, respondent's trip was meaningfully interruptive and thus she failed to meet the "continuous physical presence" requirement.

Respondent correctly notes (Br. in Opp. 7) that the Court in *Fleuti* indicated that factors other than the duration of the trip, the procurement of travel documents, and whether the alien sought to violate the immigration laws could be relevant in determining whether a trip was meaningfully interruptive. The court of appeals has essentially held, however, that the *Fleuti* factors are merely "evidentiary" and may be completely disregarded so long as the hardships associated with deportation "would be as severe if the absence had not occurred" (Pet. App. 8a). Because respondent's trip was meaningfully interruptive under *Fleuti*, the decision below is at odds with this Court's decision in that case.

The court of appeals' "hardship test" for determining whether an alien's absence is meaningfully interruptive is really no test at all. Under this "test," an alien with a sympathetic case on the merits of his suspension claim will easily be able to circumvent the statutory "continuous physical presence" requirement. This collapses the "continuous physical presence" requirement into the "extreme hardship" requirement and reads the former out of the Act. Because Congress clearly did not intend this result, which allows further wholesale evasions of

our Nation's immigration laws, the Court should grant review here in order to correct the manifest error of the court of appeals.

For the foregoing reasons and those presented in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

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In the Supreme Court of the United States

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IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

PADUNGSRI PHINPATHYA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

ELLIOTT SCHULDER
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether respondent's three-month absence from the United States may be considered meaningfully interruptive of her "continuous physical presence" in this country, for the purpose of determining eligibility for suspension of deportation pursuant to 8 U.S.C. 1254(a)(1), even though the absence may not have reduced the severity of the hardships associated with her deportation.

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IMMIGRATION AND NATURALIZATION SERVICE,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 673 F.2d 1013. The decision of the Board of Immigration Appeals (Pet. App. 14a-21a) is not reported. The decision of the immigration judge (Pet. App. 22a-31a) is also not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1981. A petition for rehearing was denied on April 5, 1982 (Pet. App. 32a). Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including July 16, 1982. The petition was filed on that date and was granted on November 1, 1982 (J.A. 44). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

8 U.S.C. 1254(a)(1) provides:

> As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—
>
> > (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence * * *.

STATEMENT

1. Respondent is a native and citizen of Thailand who first entered the United States as a nonimmigrant student in October 1969. Respondent's husband, also a native and citizen of Thailand, entered this country in August 1968. Both respondent and her husband were authorized to remain until July 25, 1971, but they remained beyond that date without securing the permission of the immigration authorities (Pet. App. 1a).

a. In January 1977, the Immigration and Naturalization Service served an order to show cause on respondent and her husband, charging that they were deportable under Section 241(a)(2) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1251(a)(2), as nonimmigrants who had remained in this country beyond the

time authorized in their visas (J.A. 29-30). At the deportation hearing, both respondent and her husband conceded deportability and applied for suspension of deportation pursuant to Section 244(a)(1) of the Act, 8 U.S.C. 1254(a)(1) (Pet. App. 2a). That section authorizes the Attorney General, in his discretion, to suspend deportation of a deportable alien. In order to be eligible for this discretionary relief, an alien must show that (1) he has been physically present in the United States for a continuous period of at least seven years immediately preceding the application for suspension of deportation; (2) he has been a person of good moral character during that seven-year period; and (3) deportation would result in extreme hardship to the alien or to his spouse, parent or child who is a United States citizen or lawful permanent resident.

In an affidavit filed in support of her suspension application, respondent asserted that she had "continuously lived in the United States since October 12, 1969" (J.A. 36). An investigation of the facts underlying respondent's application revealed, however, that she had last been admitted to the United States as the wife of a student on April 18, 1974 (J.A. 37, 38, 42). On the basis of this information, the INS amended its order to show cause with regard to respondent to reflect that respondent entered this country in April 1974 as the nonimmigrant spouse of a student, that she was authorized to remain until January 30, 1975, and that she had remained unlawfully beyond that date (J.A. 43). Counsel for respondent, while still conceding deportability, thereupon requested an opportunity "to show that this was a brief and casual and innocent departure from the United States and that [respondent] had been in the United States continuously since October 11, 1969 and

was gone from the United States for three months" (J.A. 13-14).[1]

At the ensuing hearing, respondent testified that in January 1974, she traveled with her two children to Thailand to visit her mother. She and her children returned to the United States three months later, in April 1974 (J.A. 17-18). About one month prior to her departure, respondent obtained a new Thai passport (J.A. 21-22); however, when she departed for Thailand, respondent did not have a nonimmigrant visa allowing her to reenter this country. Accordingly, after her arrival in Thailand, respondent went to the United States Consul and obtained a nonimmigrant visa as the wife of a foreign student in the United States. Although respondent was aware that her husband's student visa had expired more than two years earlier, in 1971, she failed to inform the consular officer of that fact (J.A. 23-24).

b. On the basis of this evidence, the immigration judge concluded that respondent's absence from the United States was neither brief, innocent, nor casual (Pet. App. 28a):

> The absence would have been longer than three months if she had not obtained the spouse of a student visa as fast as she did obtain it. It was not casual because she had to obtain a new Thai[] passport, as well as a nonimmigrant visa from the American Consul, to return to the United States. It was not innocent because she failed to inform the American Consul that she was the wife of a student who had been out of status for three years (and

[1] When respondent's counsel was first apprised of the results of the investigation showing that respondent had entered the United States in 1974, he stated that respondent was withdrawing her suspension application (J.A. 8). Shortly thereafter, counsel retracted that statement, explaining that respondent took the position that her absence was brief and that she had not made a "meaningful entry" in 1974 (J.A. 10).

therefore not entitled to the nonimmigrant visa she received).

Accordingly, the judge concluded that respondent's departure was meaningfully interruptive of her continuous physical presence in the United States and that she was ineligible for suspension of deportation on the ground that she had failed to meet the seven year "continuous physical presence" requirement of Section 244(a)(1) of the Immigration Act (Pet. App. 28a-29a).[2]

c. The Board of Immigration Appeals affirmed the immigration judge's decision on the "continuous physical presence" issue (Pet. App. 14a-21a).[3] In rejecting respondent's argument that her trip was not meaningfully interruptive of her "continuous physical presence" because respondent had intended, upon departing, to return to this country, the Board observed that when respondent traveled to Thailand in January 1974, "she had already remained beyond the time authorized * * * [and] was only able to obtain a visa to return by misrep-

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[2] The immigration judge rejected the contention of the INS that respondent was barred from establishing her good moral character on the ground that she had given false testimony for the purpose of obtaining a benefit under the Immigration and Nationality Act. See 8 U.S.C. 1101(f)(6) (Pet. App. 26a-27a). In addition, the judge found that respondent's epileptic daughter, who is a United States citizen, would suffer extreme hardship if respondent and her husband were deported (*id.* at 24a-26a). Finding that respondent's husband had satisfied the other eligibility requirements of Section 244(a)(1) of the Act (Pet. App. 26a, 27a), the judge granted suspension of deportation as to him (*id.* at 29a-31a).

[3] The Board reversed the immigration judge's decision with regard to the good moral character issue, finding that respondent gave false testimony at her deportation hearing (Pet. App. 18a-19a). The Board also reversed the immigration judge's conclusion that respondent's husband was eligible for suspension of deportation, ruling that he had failed to establish extreme hardship either to himself or to his epileptic daughter (*id.* at 19a-21a).

resenting her status as the spouse of a student, knowing full-well that she had no right to claim that status" (*id.* at 17a). Because respondent's departure substantially increased the likelihood that her illegal status would be discovered and that she would either be excluded or deported once her true status was ascertained, the BIA concluded that respondent's departure was a significant interruption of her physical presence in the United States, regardless of her intention to return to this country (*id.* at 17a-18a).

2. The court of appeals reversed (Pet. App. 1a-13a). Relying on its decision in *Kamheangpatiyooth* v. *INS*, 597 F.2d 1253 (9th Cir. 1979), the court concluded that the Board of Immigration Appeals had applied an erroneous legal standard in reaching its determination that respondent failed to meet the "continuous physical presence" requirement of Section 244(a)(1) of the Act (Pet. App. 8a).

In *Kamheangpatiyooth*, the court reaffirmed its earlier ruling in *Wadman* v. *INS*, 329 F.2d 812 (9th Cir. 1964), that the principles established by this Court in *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963), to decide whether a departure by a lawful permanent resident alien was "intended" within the meaning of 8 U.S.C. 1101(a)(13), for purposes of determining whether the alien made an "entry" on his return to the United States, "should also guide the determination * * * whether an intervening absence interrupts the continuity of physical presence for purposes of section 244(a)(1)." 597 F.2d at 1256. Although this Court in *Fleuti* had pointed to several factors, including the duration of the alien's absence, the purpose of the visit and whether travel documents were obtained, as being relevant in determining whether a departure was meaningfully interruptive of an alien's lawful permanent residence (374 U.S. at 462), the court in *Kamheangpatiyooth* concluded that "these factors are only evidentiary on the issue under section

244(a)(1) of whether an absence reduced the significance of the whole seven-year period as reflective of the hardship and unexpectedness of exposure to expulsion." 597 F.2d at 1257 (footnote omitted). In the court of appeals' view (*ibid.*):

> An absence cannot be significant or meaningfully interruptive of the whole period if indications are that the hardship of deportation to the alien would be equally severe had the absence not occurred, and that no significant increase in the likelihood of deportation could reasonably have been expected to flow from the manner and circumstances surrounding the absence.

In the instant case, the court of appeals first noted that although respondent traveled to Thailand for three months, "she intended, at all times, to return to the United States" (Pet. App. 7a; footnote omitted).[4] The court then held that the Board of Immigration Appeals erred in concluding that respondent's departure was meaningfully interruptive merely because she thereby increased the risk of deportation (*id.* at 7a-8a). Instead, the court concluded that under the *Kamheangpatiyooth* test, a departure that increases an alien's risk of deportation cannot be meaningfully interruptive unless it also reduces the severity of the hardships that would result from deportation; moreover, according to the court, even if both factors are present, it does not necessarily follow that the departure must be regarded as having meaningfully inter-

[4] In describing respondent's trip, the court of appeals stated (Pet. App. 1a-2a, 6a) that the trip was for the purpose of visiting her sick mother. However, there is no evidence in the record of the administrative proceeding that respondent's mother was ill at the time of respondent's trip, much less that the illness occasioned respondent's visit to Thailand.

rupted the alien's "continuous physical presence" in the United States (Pet. App. 8a).[5]

INTRODUCTION AND SUMMARY OF ARGUMENT

In the Immigration and Nationality Act, Congress provided that the Attorney General may suspend deportation and grant lawful resident status to an otherwise deportable alien who meets the "extreme hardship," "good moral character" and "continuous physical presence" requirements of Section 244(a)(1) of the Act. The question in this case concerns the proper standard for determining whether a deportable alien "has been physically present in the United States for a continuous

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[5] The court of appeals also overturned the BIA's determination that respondent was not of good moral character, holding that respondent's false statement on her application for suspension of deportation did not constitute false "testimony" within the meaning of 8 U.S.C. 1101(f)(6) and 1254(a)(1) (Pet. App. 9a-11a). Accordingly, the court remanded respondent's case to the BIA for reconsideration of the "continuous physical presence" and "good moral character" issues (*id.* at 12a).

In addition, the court reversed the BIA's finding that respondent's husband failed to prove that extreme hardship would result from deportation. The court held that the BIA abused its discretion in failing explicitly to consider the adverse effects of "the mere removal, and uprooting of [respondent's] epileptic child" from the United States (Pet. App. 4a-5a). The court remanded for reconsideration of "extreme hardship."

We believe that both of these rulings are questionable. The court's discussion of extreme hardship, in particular, demonstrates the Ninth Circuit's continued inability or unwillingness to follow this Court's directive in *INS* v. *Wang*, 450 U.S. 139 (1981), that the Attorney General's "construction and application of [the extreme hardship] standard should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute." *Id.* at 144. See, *e.g.*, *Prapavat* v. *INS*, 662 F.2d 561 (9th Cir. 1981); *Mejia-Carrillo* v. *INS*, 656 F.2d 520 (9th Cir. 1981); *Perez* v. *INS*, 643 F.2d 640 (9th Cir. 1981), petition for cert. dismissed pursuant to Sup. Ct. Rule 53, No. 82-243 (Nov. 2, 1982).

period of not less than seven years immediately preceding the date of [his] application [for suspension of deportation]." 8 U.S.C. 1254(a)(1).

It is fairly obvious that a literal interpretation of the "continuous physical presence" language in the statute would yield a simple and easily applied standard. Under this interpretation, an alien would be regarded as breaking the "continuity" of his "physical presence" within the meaning of Section 244(a)(1) any time he stepped outside our borders, regardless of the purpose or duration of his absence. For nearly 20 years, however—ever since the Ninth Circuit, in *Wadman* v. *INS*, 329 F.2d 812 (1964), held that the principles of *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963), are applicable in determining whether an alien's absence from this country has meaningfully interrupted the continuity of his physical presence in the United States—both the courts of appeals and the Board of Immigration Appeals have eschewed such a literal approach. Although the soundness of *Wadman* and, indeed, of *Fleuti*, may be subject to question, we do not challenge the validity of either decision here.

But even assuming, for present purposes, that the seven year "continuous physical presence" requirement of Section 244(a)(1) is not subject to a literal construction, the error of the court of appeals in this case is manifest. The court below held that the "continuous physical presence" requirement is satisfied in the case of an alien whose illegal overstay in this country has been interrupted by a three month trip abroad and who has knowingly misrepresented her status so as to secure reentry into the United States. Simply put, it is our submission that Congress could not conceivably have intended this result.

The court of appeals achieved this result by application of a test that finds no support in the language, structure or history of the Act, all of which indicate

that Congress intended the "continuous physical presence" requirement to be given a narrow interpretation. While, as already noted, the lower courts and the BIA have recognized an exception to the "continuous physical presence" requirement in the case of an alien whose absence is not "meaningfully interruptive" of his physical presence in the United States under the test established in *Rosenberg* v. *Fleuti*, *supra*, the decision below effectively erodes that test by concluding that a departure cannot be meaningfully interruptive if it does not reduce the hardships that would flow from the alien's deportation. This approach unjustifiably commingles two separate statutory elements, "extreme hardship" and "continuous physical presence." It is difficult to conceive of a class of cases in which deportable aliens would be able to show "extreme hardship" but not "continuous physical presence" under the court of appeals' interpretation.

Moreover, the court below concluded that the factors mentioned in *Fleuti* can be disregarded as merely "evidentiary"; in the court's view, the proper approach in determining whether an alien's absence was meaningfully interruptive "is to view the circumstances in their totality, and analyze those circumstances in light of the Congressional purpose underlying the continuity requirement" (Pet. App. 6a). Under this amorphous approach, the BIA is essentially left without any guidance and reviewing courts are left free to overturn administrative findings of no "continuous physical presence" in any given case on the basis of whatever "circumstances" the court cares to invoke.

Because the decision below seriously undermines this Court's *Fleuti* test, the decision will have substantial repercussions beyond the suspension of deportation context. If a lengthy departure such as respondent's is not meaningfully interruptive of an alien's "continuous physical presence" for purposes of determining eligibil-

ity for suspension of deportation, then a similar departure presumably would not be regarded as a meaningful interruption of an alien's lawful residence for purposes of determining, under 8 U.S.C. 1101(a)(13), whether a lawful permanent resident alien attempted or made an "entry" that would subject him to exclusion or deportation under the immigration laws. Thus, unless overturned, the court of appeals' decision will frustrate the government's efforts to deport aliens, such as respondent, who have repeatedly flouted the Nation's immigration laws.

ARGUMENT

THE COURT OF APPEALS ERRED IN REQUIRING THE BOARD OF IMMIGRATION APPEALS TO FIND THAT RESPONDENT'S THREE-MONTH ABSENCE FROM THE UNITED STATES WAS NOT MEANINGFULLY INTERRUPTIVE OF HER "CONTINUOUS PHYSICAL PRESENCE" IN THIS COUNTRY, FOR THE PURPOSE OF DETERMINING ELIGIBILITY FOR SUSPENSION OF DEPORTATION PURSUANT TO 8 U.S.C. 1254(a)(1), BECAUSE THE HARDSHIPS ASSOCIATED WITH HER DEPORTATION WOULD BE AS SEVERE IF THE ABSENCE HAD NOT OCCURRED

A. Respondent Failed To Show That Her Three-Month Trip Abroad Was Not Meaningfully Interruptive Under The "Innocent, Casual And Brief" Test Adopted By This Court In *Rosenberg* v. *Fleuti*

1. Under Section 244(a)(1) of the Immigration and Nationality Act, a deportable alien is ineligible for the extraordinary remedy of suspension of deportation unless he shows, inter alia, that he "has been *physically present* in the United States for a *continuous period of not less than seven years* immediately preceding the date of [his] application [for suspension of deportation]." 8 U.S.C. 1254(a)(1) (emphasis added). Until the Ninth Circuit's decision in 1964 in *Wadman* v. *INS*, 329 F.2d 812, the lower courts and the Board of Immigration Appeals generally applied a strict, literal interpretation of the "continuous physical presence" lan-

guage in Section 244(a)(1) and held ineligible for suspension of deportation any alien who was absent from the United States during the seven year period, without regard to the circumstances surrounding the absence. See, *e.g.*, *Arellano-Flores* v. *Hoy*, 262 F.2d 667, 668 (9th Cir. 1958); *United States ex rel. Bruno* v. *Sweet*, 133 F. Supp. 3, 6-7 (W.D. Mo. 1955), aff'd, 235 F.2d 801 (8th Cir. 1956); *In re Jacobson*, 10 I. & N. Dec. 782 (B.I.A. 1964); *In re Wong*, 10 I. & N. Dec. 513 (B.I.A. 1964). But see *McLeod* v. *Peterson*, 283 F.2d 180, 185-187 (3d Cir. 1960). In *Wadman*, however, the court held that the standards of *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963), should be applied to determine whether an alien's trip outside the United States was a sufficiently significant event as to break the continuity of the alien's physical presence in the United States.

In *Fleuti*, the Court faced the question whether a lawful permanent resident alien's return from an afternoon trip across the border to Mexico was an "entry" within the meaning of Section 101(a)(13) of the Act, 8 U.S.C. 1101(a)(13). That statute defines an "entry" as

> any coming of an alien into the United States * * * except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him * * *.

A sharply divided Court construed the term "intended" in the exception to the definition of "entry" for unintended departures by lawful resident aliens "as meaning an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence." 374 U.S. at 462. The Court refused to hold that a lawful resident alien like Fleuti was subject "to exclusion for a condition for which he could

not have been deported had he remained in the country" merely because he "steps across a border and, in effect, steps right back * * *." *Id.* at 460. Such a holding, the Court concluded, would in effect place the alien "at the mercy of the 'sport of chance'" and subject him to "'meaningless and irrational hazards.'" *Ibid.*, quoting *DiPasquale* v. *Karnuth*, 158 F.2d 878, 879 (2d Cir. 1947) (L. Hand, J.). In light of Congress' unquestioned ameliorative intent in creating an exception to the strict "entry" doctrine,[6] the Court concluded that

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[6] Section 101(a)(13) was enacted in 1952 in response to the harsh results visited upon resident aliens by earlier restrictive interpretations of the term "entry." The Senate and House Reports explained the statute in identical language:

> Normally an entry occurs when the alien crosses the border of the United States and makes a physical entry, and the question of whether an entry has been made is susceptible of a precise determination. However, for the purposes of determining the effect of a subsequent entry upon the status of an alien who has previously entered the United States and resided therein, the preciseness of the term "entry" has not been found to be as apparent. Earlier judicial constructions of the term in the immigration laws, as set forth in *Volpe* v. *Smith* (289 U.S. 422 (1933)), generally held that the term "entry" included any coming of an alien from a foreign country to the United States whether such coming be the first or a subsequent one. More recently, the courts have departed from the rigidity of that rule and have recognized that an alien does not make an entry upon his return to the United States from a foreign country where he had no intent to leave the United States (*Di Pasquale* v. *Karnuth*, 158 F.2d 878 (C.C.A. 2d 1947)), or did not leave the country voluntarily (*Delgadillo* v. *Carmichael*, 332 U.S. 388 (1947)). The bill defines the term "entry" as precisely as practicable, giving due recognition to the judicial precedents. Thus any coming of an alien from a foreign port or place or an outlying possession into the United States is to be considered an entry, whether voluntary or otherwise, unless the Attorney General is satisfied the departure of the alien, other than a deportee, from this country was unintentional or was not voluntary.

"an innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been 'intended' as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an 'entry' into the country on his return." 374 U.S. at 462. This approach, according to the Court, "protects the resident alien from unsuspected risks and unintended consequences of such a wholly innocent action." *Ibid.*

The Court in *Fleuti* listed several factors that it considered relevant in determining whether a lawful permanent resident alien's departure was intended to be "meaningfully interruptive" of his permanent residence (374 U.S. at 462):

> One major factor relevant to whether such intent can be inferred is, of course, the length of time the alien is absent. Another is the purpose of the visit, for if the purpose of leaving the country is to accomplish some object which is itself contrary to some policy reflected in our immigration laws, it would appear that the interruption of residence thereby occurring would properly be regarded as meaningful. Still another is whether the alien has to procure any travel documents in order to make his trip, since the need to obtain such items might well cause the alien to consider more fully the implications involved in his leaving the country.

S. Rep. No. 1137, 82d Cong., 2d Sess. 4 (1952); H.R. Rep. No. 1365, 82d Cong. 2d Sess. 32 (1952).

In *DiPasquale*, the court had refused to hold that a resident alien made an "entry" after an overnight train on which the alien was a passenger passed through Canada on its way from Buffalo to Detroit. Similarly, in *Delgadillo* v. *Carmichael*, 332 U.S. 388 (1947), this Court had refused to treat as an "entry" the return of an alien taken to Cuba to recuperate after the merchant vessel on which he sailed was torpedoed during World War II. See *Landon* v. *Plasencia*, No. 81-129 (Nov. 15, 1982), slip op.9 n.6.

The Court pointed out that "the operation of these and other possibly relevant factors remain to be developed 'by the gradual process of judicial inclusion and exclusion' * * *." *Ibid.*, quoting *Davidson* v. *New Orleans*, 96 U.S. 97, 104 (1878). Because the record showed only that Fleuti had gone to Mexico for a visit of "'about a couple of hours'" (374 U.S. at 461), the Court remanded the case for a determination of whether Fleuti's departure was "not intended" within the meaning of Section 101(a)(13).[7]

The Ninth Circuit in *Wadman* concluded that "the term 'continuous' [in Section 244(a)(1)] is no more subject to a hard and fast construction than is the term 'intended' [in Section 101(a)(13).] The question is whether the interruption, viewed in balance with its consequences, can be said to have been a significant one under the guides laid down in Fleuti." 329 F.2d at 816. Accordingly, the court in *Wadman* rejected the argument that the term "continuous" in Section 244(a)(1) must be construed literally. Because Wadman had remained in the United States for more than seven years prior to his application for suspension of deportation, with the exception of a five day vacation trip to Mexico, the court remanded the case to the INS for further proceedings on the "continuous physical presence" issue.

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[7] The four dissenting Justices in *Fleuti* concluded that the plain language and legislative history of Section 101(a)(13) compelled the view that Fleuti, whose departure from the United States clearly had been "intended," was subject to the consequences of an entry on his return to this country. 374 U.S. at 464-467. The dissenters noted that the definition of "entry" adopted by the Court had been suggested by many organizations prior to the enactment of Section 101(a)(13) but that Congress had explicitly rejected such an approach. See C. Gordon, *Recent Developments in Judicial Review of Immigration Cases*, 15 San Diego L. Rev. 9, 18 (1977); Comment, *Exclusion and Deportation of Resident Aliens: The Re-entry Doctrine and the Need for Reform*, 13 San Diego L. Rev. 192, 197-200 (1975).

Following the decision in *Wadman*, the courts of appeals and the BIA began to apply the *Fleuti* standards in determining whether an alien's trip abroad broke the continuity of his physical presence in the United States for purposes of Section 244(a)(1). See, *e.g.*, *Toon-Ming Wong* v. *INS*, 363 F.2d 234, 235-236 (9th Cir. 1966); *Barragan-Sanchez* v. *Rosenberg*, 471 F.2d 758, 760-761 (9th Cir. 1972); *Heitland* v. *INS*, 551 F.2d 495, 500-504 (2d Cir.), cert. denied, 434 U.S. 819 (1977); *Mamanee* v. *INS*, 566 F.2d 1103, 1105 (9th Cir. 1977); *In re Wong*, 12 I. & N. Dec. 271 (B.I.A. 1967).

2. We are not all all certain that application of the *Fleuti* standards in the suspension of deportation context is consistent with Congress' intent that the "continuous physical presence" requirement in Section 244(a)(1) be construed strictly. See pages 20-25, *infra*. Nevertheless, even if the standards established in *Fleuti* are applicable in this context, we submit that under those standards respondent failed to meet her burden of showing that her trip abroad was not meaningfully interruptive of her "continuous physical presence" in the United States. Accordingly, respondent is ineligible for suspension of deportation.

Respondent's trip abroad was not "brief"; unlike Fleuti, whose visit to Mexico consumed "'about a couple of hours'" (374 U.S. at 461), respondent traveled to Thailand for three months. Nor was respondent's trip "casual"; unlike Fleuti, respondent obtained a passport before leaving the United States. Finally, unlike Fleuti, respondent's actions were not "wholly innocent" (374 U.S. at 462), because she knowingly misrepresented her status in order to secure reentry into this country.

The court of appeals nonetheless concluded that these factors are merely "evidentiary" and could be disregarded because respondent's husband remained in this country and "she intended, at all times, to return to the United States" (Pet. App. 7a; footnote omitted). An in-

tent to return to the United States, however, is of little, if any, relevance in determining whether an absence has meaningfully interrupted either the continuity of a deportable alien's physical presence in the United States for purposes of Section 244(a)(1) or a lawful alien's permanent residence under Section 101(a)(13). Under the latter statute, after all, the question is whether the resident alien's *departure* was "not intended," not whether the alien's *return* was "not intended." Because, as we show below, Congress meant the "continuous physical presence" requirement to be strictly construed, there is no reason to believe that an "intent to return" is of any greater significance under the suspension of deportation statute than it is under the "entry" statute construed in *Fleuti*.

3. Comparison of the facts of this case with the decisions of other courts of appeals that have applied the *Fleuti* standards in the suspension of deportation context compels the conclusion that respondent's trip was meaningfully interruptive and that she failed to satisfy the "continuous physical presence" requirement. In *Heitland* v. *INS*, *supra*, for example, the Second Circuit relied on both *Fleuti* and *Wadman* in concluding that the aliens' six-week trip abroad was meaningfully interruptive of their "continuous physical presence" in this country. The court cited several relevant factors that militated strongly against a finding that the aliens' presence was continuous. First, unlike Fleuti and Wadman, "who were at all times lawful permanent resident aliens prior to their departure, the Heitlands, once they remained beyond the six-month period for which they were originally admitted to stay in the United States, were at all times present in this country in violation of its laws." 551 F.2d at 502. Because the Heitlands had "no right at all to reside in this country at the time of their departure for their native land," their situation was markedly different from that of Fleuti and Wad-

man, "who had the right to reside in the United States, [and] would not have been subject to deportation if they had simply remained within this country's borders." *Ibid.* Second, the court noted that before embarking on their trip the Heitlands had to obtain passports and visas, thus evidencing "the deliberateness with which [the trip] was undertaken." *Ibid.* Finally, the court pointed out that "in using implicitly deceptive methods to secure re-entry in the United States, the Heitlands were engaged in a course of conduct directly contrary to a 'policy reflected in our immigration laws.'" *Id.* at 503, quoting *Rosenberg* v. *Fleuti*, *supra*, 374 U.S. at 462.

The circumstances of this case are remarkably similar to those in *Heitland*. Here, respondent, who traveled abroad for three months, was illegally in the United States when she departed, and, accordingly, she had no reasonable basis to expect the government to permit her to remain in this country or to readmit her upon her return. Respondent obtained a passport prior to her departure, an event that should have caused her "to consider more fully the implications involved in [her] leaving the country." *Rosenberg* v. *Fleuti*, *supra*, 374 U.S. at 462. Finally, as both the immigration judge (Pet. App. 28a) and the Board of Immigration Appeals (*id.* at 17a-18a) found, respondent knowingly misrepresented her status in order to secure reentry into the United States. Hence, the Second Circuit's statement in *Heitland* is equally applicable to respondent (551 F.2d at 503-504):

> The implicitly fraudulent circumstances of [her] return, when considered with the admitted illegality of [her] presence in the United States before [her] departure and the substantial period of time for which [she] absented [herself], do not present a picture of the type of hardship or injustice which *Fleuti* or its progeny were intended to remedy.

> This was a substantial and deliberate interruption of an illegal presence in the United States, accomplished through consciously misleading conduct.

Similarly, in *McColvin* v. *INS*, 648 F.2d 935 (4th Cir. 1981), the alien was found deportable for staying in this country beyond the time authorized and was granted the privilege of voluntary departure. The day after he departed the United States, the alien reentered this country as a nonimmigrant visitor for business authorized to remain for a period not to exceed six months. In concluding that the alien's one-day absence was meaningfully interruptive, the court observed that "any roots that petitioner had established in the United States were put down with the knowledge that his stay in this country was temporary, and, therefore, any plans or expectations for the future that he might have developed could not have been legitimate ones." 648 F.2d at 939. In addition, the court noted that the alien left "with the knowledge that, if he did not depart voluntarily, he would be deported. If he left with the intention of returning, that intention was disingenuous." *Ibid.*

In contrast to McColvin, who was absent from this country for only one day, respondent remained outside the United States for three months. The court of appeals, however, relying on its earlier decision in *Kamheangpatiyooth* v. *INS*, 597 F.2d 1253 (9th Cir. 1979), held that the Board of Immigration Appeals applied an erroneous legal standard in concluding that respondent's absence was meaningfully interruptive. As we now show, the decision below is based on an overly generous construction of the suspension of deportation statute, improperly commingles the "extreme hardship" and "continuous physical presence" requirements of the statute, and will undermine enforcement of our immigration laws.

B. The Language, Structure And History Of The Immigration And Nationality Act Support A Narrow Construction Of The "Continuous Physical Presence" Requirement

In *Kamheangpatiyooth* v. *INS*, *supra*, the court of appeals assumed that Congress intended the "continuous physical presence" requirement of Section 244(a)(1) "to be generously construed." 597 F.2d at 1256.[8] That assumption, which also underlies the decision below, is contrary to the language, structure and history of the statute, all of which point in precisely the opposite direction.

1. In Section 244(a)(1) Congress provided that an alien applying for the extraordinary relief of suspension of deportation must have been "physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application * * *." 8 U.S.C. 1254(a)(1). The language of the statute, which includes modifiers such as "*physically* present" and "*continuous* period," reflects a congressional intent that the "continuous physical presence" requirement be read narrowly. On its face, the statute "contains no exception to the requirement of seven years of 'continuous physical presence' in the United States to be eligible for suspension of deportation." *McColvin* v. *INS*, *supra*, 648 F.2d at 937.

Moreover, in *Jay* v. *Boyd*, 351 U.S. 345, 357 (1956), this Court rejected the suggestion that it should resolve all doubts in favor of the applicant in construing the suspension of deportation statute; instead, the Court stated, "we must adopt the plain meaning of a statute, however severe the consequences." More recently, in

[8] Indeed, at one point the court suggested (597 F.2d at 1260 n.7) that the "continuous physical presence" requirement of Section 244(a)(1) should be given "a more liberal reading" than the "entry" provision (8 U.S.C. 1101(a)(13)) considered in *Fleuti*.

INS v. *Wang*, 450 U.S. 139, 145 (1981), this Court observed that a narrow interpretation of the term "extreme hardship" in Section 244(a)(1) "is consistent with the 'extreme hardship' language, which itself indicates the exceptional nature of the suspension remedy." It would be anomalous to conclude that Congress permitted one of the eligibility requirements for suspension of deportation ("extreme hardship") to be construed narrowly while at the same time requiring that another of the statutory requirements ("continuous physical presence") be given a generous construction.

2. Comparison of Section 244(a)(1) with other contemporaneously enacted provisions of the Immigration and Nationality Act reinforces the view that Congress intended the "continuous physical presence" requirement in Section 244(a)(1) to be construed strictly. Thus, former Section 301(b) of the Act, 8 U.S.C. 1401(b), provided that certain individuals shall lose their status as United States nationals and citizens unless they "come to the United States and [are] continuously physically present therein for a period of not less than two years" between 14 and 28 years of age. Section 301(b) further provided that "[i]n the administration of this subsection absence from the United States of less than sixty days in the aggregate during the period for which continuous physical presence in the United States is required shall not break the continuity of such physical presence." Under traditional principles of statutory construction, the deliberate omission of a similar provision in Section 244(a)(1) compels the conclusion that Congress meant the "continuous physical presence" requirement of that section to be given a narrow, if not a literal, interpretation. See *Fedorenko* v. *United States*, 449 U.S. 490, 512 (1981).

Similarly, Section 316 of the Act, 8 U.S.C. 1427, which establishes a five year continuous "residence" requirement for admission to citizenship as well as a separate requirement of "physical presence" totalling at

least half of the period of residence, underscores the distinction in the Act between residence and physical presence. This distinction is critical in the context of Section 244(a)(1) because, as the legislative history (discussed below) demonstrates, Congress amended the suspension of deportation statute by replacing a seven year "continuous residence" requirement with the current "continuous physical presence" requirement. Under the present statutory scheme, therefore, "the mere maintenance of a domicile or place of general abode is not sufficient. The statute is explicit in commanding in each instance continuous physical presence in the United States * * *." 2C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 7.9d(2), at 7–145 (1979) (footnote omitted).

3. The court in *Kamheangpatiyooth* sought to justify its loose reading of the "continuous physical presence" requirement by reference to "the ameliorative aim of the § 244(a) suspension process" (597 F.2d at 1256 n.3) as purportedly reflected in the legislative history of the statute. The legislative history on which the court relied (*id.* at 1256 n.4), however, is inapposite because it predates the enactment of the "continuous physical presence" provision.

Prior to 1940, "the Attorney General had no discretion in ordering deportation, and an alien's sole remedy was to obtain a private bill from Congress." *INS* v. *Wang*, *supra*, 450 U.S. at 140 n.1. See *Foti* v. *INS*, 375 U.S. 217, 222 (1963). In the Alien Registration Act of 1940, ch. 439, Section 20, 54 Stat. 672, Congress authorized the Attorney General to suspend deportation of aliens of good moral character whose deportation "would result in serious economic detriment" to their citizen or lawful resident alien family members. In 1948, Congress amended the statute to make the suspension process available to aliens who "resided continuously in the United States for seven years or more"

and who could show good moral character for the preceding five years, regardless of family ties. Act of July 1, 1948, ch. 783, 62 Stat. 1206.[9]

While the above history tends to support the view expressed by the court of appeals in *Kamheangpatiyooth* that the suspension of deportation statute was enacted to serve a generally "remedial" purpose (597 F.2d at 1256), that history is of no help in construing the "continuous physical presence" provision of the statute, which was not enacted until 1952. The history of the 1952 Act reflects Congress' intention that the "continuous physical presence" requirement "be applied in a rigorous manner." *McColvin* v. *INS*, *supra*, 648 F.2d at 938.

In its studies of the Nation's immigration laws which led to the enactment of the 1952 Act, the Senate Committee on the Judiciary noted that INS field officers had "criticized the administrative interpretation of the 7-year residence provisions of the law. These provisions have been held applicable to an alien who has a total of 7 years' residence in the United States, although the alien has been out of the United States for as long as 2 years during the last 7 years." S. Rep. No. 1515, 81st

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[9] The Senate Report explained:

> It is the information of the committee that there are a number of worthy cases in which persons, deportable on technical grounds, have lived in the United States for many years, but have no close family ties so as to enable them to become eligible for discretionary relief on the basis of serious economic detriment to the citizen or legally resident alien, who is the spouse, parent, or minor child of such persons. The committee has already considered and recommended the enactment of private bills to adjust the immigration status of certain deportable aliens who are in this general category. It is only just that other persons in this category who have not been favored by the introduction of private bills should have their cases considered for relief.

S. Rep. No. 1204, 80th Cong., 2d Sess. 3 (1948).

Cong., 2d Sess. 602 (1950). Two years later, "in an attempt to discontinue lax practices and discourage abuses" (H.R. Rep. No. 1365, 82d Cong., 2d Sess. 31 (1952)), Congress amended the suspension of deportation statute to require seven years' continuous *physical presence* in the United States.[10]

In short, the 1952 amendments to the suspension of deportation statute manifested Congress' "design to restrict the opportunity for discretionary action * * *. The 1952 Act thus was a reversal of the previous trend for the allowance of a wide flexibility in order to alleviate hardship." 2 C. Gordon & H. Rosenfield, *supra*, § 7.9a, at 7-131 (footnote omitted). Accordingly, it is clear that Congress intended the "continuous physical presence" requirement to be strictly construed. The court of appeals' overly generous interpretation of the statute is directly contrary to this intent.

4. Respondent nevertheless argues (Br. in Opp. 4-5) that a liberal interpretation of the "continuous physical presence" requirement would not detract from the exceptional nature of the suspension of deportation remedy because the alien must still satisfy the "good moral character" and "extreme hardship" requirements of the statute. Of course, the same argument could be made, in turn, with respect to each of the other statutory requirements.[11] Respondent also contends that a gener-

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[10] The 1952 Act also required an alien to show "exceptional and extremely unusual hardship" in order to qualify for suspension of deportation. 8 U.S.C. (1952 ed.) 1254(a)(1). Although this provision was subsequently amended to require that the alien show that deportation would result in "extreme hardship" (Act of Oct. 24, 1962, Pub. L. No. 87-885, Section 4, 76 Stat. 1248), the "continuous physical presence" requirement remained unchanged.

[11] In fact, as we have noted above (see page 8, note 5), the erroneous approach of the court of appeals on the "continuous physical presence" issue is also reflected in its reversal of the

ous construction of the statute is appropriate because it will not require the granting of relief, which is within the Attorney General's discretion. But Congress explicitly provided that the Attorney General need not exercise his discretion, and indeed does not even have authority to grant suspension of deportation, unless the alien satisfies the statutory eligibility requirements. Unless Congress' dictates are to be ignored, the eligibility requirements must be given a more rigorous interpretation than that accorded by the court of appeals.

C. The "Hardship Test" Adopted By Court Of Appeals Renders The "Continuous Physical Presence" Requirement Meaningless

After stating that Section 244(a)(1) is to be "generously construed," the court in *Kamheangpatiyooth* purported to explain the "function" of the seven-year "continuous physical presence" requirement (597 F.2d at 1256; footnote omitted):

> It was Congress's judgment that presence of that length was likely to give rise to a sufficient commitment to this society through establishment of roots and development of plans and expectations for the future to justify an examination by the Attorney General of the circumstances of the particular case to determine whether deportation would be unduly harsh. Continuity in the prescribed period of physical presence was required because continuity is important to the legitimacy of the inference that extended presence is likely to make deportation harsh. Presence that is only intermittent suggests the alien has not become so attached to this country that the authorities should consider suspending normal operation of the immigration laws on his behalf.

The court's assertions concerning the congressional purpose for adopting the "continuous physical pres-

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determinations of the Board of Immigration Appeals on the "good moral character" and "extreme hardship" issues.

ence" requirement are wholly speculative and find no support in the language or history of the statute. See pages 20-25, *supra*. It is well established that Congress ordinarily expresses its purpose through the words used in the statute itself. See *American Tobacco Co.* v. *Patterson*, No. 80-1199 (Apr. 5, 1982), slip op. 5; *Richards* v. *United States*, 369 U.S. 1, 9 (1962). Here, the statute speaks in terms of "continuous physical presence," not "non-intermittent presence." Moreover, the harshness of deportation is addressed in the separate "extreme hardship" requirement of the statute.

Nevertheless, based on its speculative view of the congressional purpose, the court in *Kamheangpatiyooth* held (597 F.2d at 1257) that

> [a]n absence cannot be significant or meaningfully interruptive of the whole period if indications are that the hardship of deportation to the alien would be equally severe had the absence not occurred, and that no significant increase in the likelihood of deportation could reasonably have been expected to flow from the manner and circumstances surrounding the absence.

The court of appeals in this case relied heavily on this test in ruling that the BIA applied an erroneous standard when it concluded that respondent's trip abroad was meaningfully interruptive of her "continuous physical presence." Thus, even though respondent may have increased the risk of deportation as a result of her three-month absence and her false representations to secure reentry, the court below held that an absence cannot be considered meaningfully interruptive unless *both* factors—an increase in the risk of deportation *and* a reduction in the severity of hardship—are present (Pet. App. 8a). Indeed, the court of appeals suggested that an alien's absence would not necessarily be deemed meaningfully interruptive even if both factors are satisfied (*ibid.*).

The court of appeals' "hardship test" for determining whether an alien's absence is meaningfully interruptive is really no test at all. Under the court of appeals' approach, it is difficult, if not impossible, to conceive of a class of cases in which deportable aliens who have been in the United States for more than seven years would be able to satisfy the "extreme hardship" requirement but not the "continuous physical presence" requirement. To take one example, an alien who purchases a residence or obtains a job during a trip outside the United States might be said, under the court of appeals' test, to have meaningfully interrupted the continuity of his physical presence here, because his activities while outside the United States may have lessened the severity of his deportation. But such an alien is exceedingly unlikely to apply for Section 244(a)(1) relief upon his return to the United States, and if he did, suspension relief would be denied because the alien would also be unable to show that his deportation would result in "extreme hardship." Thus, the court's "hardship test" collapses the "continuous physical presence" requirement into the "extreme hardship" requirement and reads the former out of the Act.[12]

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[12] The decision below does not represent an isolated instance in which the Ninth Circuit has effectively disregarded the "continuous physical presence" requirement. See *Chan* v. *INS*, 610 F.2d 651 (1979), opinion withdrawn and petition for rehearing dismissed for mootness, 649 F.2d 753 (1980) (neither three-month trip to Hong Kong nor two-month trip to Austria were meaningfully interruptive); *de Gallardo* v. *INS*, 624 F.2d 85 (1980) (three and one-half month pleasure trip did not interrupt period of continuous presence); *Sida* v. *INS*, 665 F.2d 851 (1981) (month-long visit to Thailand to get married did not interrupt continuity of physical presence); *Hafeez* v. *INS*, No. 81-7453 (9th Cir. Dec. 1, 1982) (dictum; court noted that while alien traveled to Pakistan for four months to visit his family and made no living arrangements in the United States prior to his trip, record did not show that alien did anything while abroad to

Nothing in the language or history of Section 244(a)(1) suggests that Congress intended the determination of whether an alien has met the "continuous physical presence" requirement to turn on whether the alien's absence has reduced the severity of the hardships associated with deportation. As we have noted previously, Congress in Section 244(a)(1) already has provided for consideration of "extreme hardship" as a separate element in determining an alien's eligibility for suspension of deportation. It simply makes no sense to construe the "continuous physical presence" requirement as also requiring an assessment of hardship.

Moreover, the court of appeals' imposition of a "hardship" analysis in deciding the "continuous physical presence" issue is inconsistent with *INS* v. *Wang*, *supra*, where this Court held that the courts may not encroach upon the authority of the Attorney General and his delegates to construe the "extreme hardship" language "narrowly should they deem it wise to do so." 450 U.S. at 145. Here, instead of encroaching directly on this authority, the court below has required the Attorney General and his delegates to weigh the relative severity of the hardships of deportation as a principal factor in considering "continuous physical presence," a totally separate statutory prerequisite for suspension of deportation. By stressing the importance of hardship as a factor, the court has "made it much easier for an alien seeking suspension relief to prove the continuous physical presence element of his prima facie case." Comment, *Suspension of Deportation: A Revitalized Relief for the Alien*, 18 San Diego L. Rev. 65, 82 (1980). Congress clearly did not intend this result, which allows further wholesale invasions of our Nation's immigration laws.

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diminish the hardship of deportation and thus BIA erred in finding that alien did not satisfy "continuous physical presence" requirement).

D. The Court Of Appeals' Application Of The "Innocent, Casual And Brief" Test Established In *Rosenberg* v. *Fleuti* Will Undermine Enforcement Of The Nation's Immigration Laws

Because the courts since *Wadman* have treated the terms "continuous" in Section 244(a)(1) and "not intended" in Section 101(a)(13) of the Act as analytically analogous, the implications of the decision below extend beyond the suspension of deportation context. If a departure is not meaningfully interruptive of an alien's "continuous physical presence" within the meaning of Section 244(a)(1), then presumably it also would not be meaningfully interruptive for purposes of invoking the "entry" doctrine codified in Section 101(a)(13) with respect to lawful permanent resident aliens.

In its decision in *Fleuti*, this Court did not attempt to establish a rigid definition of what constitutes a "meaningfully interruptive" departure. Instead, the Court listed several factors that it deemed relevant in making that determination in any given case, including the length of the trip, whether travel documents were procured prior to departure and whether the purpose of the trip was to accomplish an object contrary to our immigration laws. 374 U.S. at 462. At the same time, the Court recognized that additional factors might be considered by the courts in future cases. Consistent with this Court's approach in *Fleuti*, we do not believe that a bright line may readily be drawn between departures that are meaningfully interruptive and those that are not. In our view, the precise contours of the *Fleuti* doctrine remain to be fleshed out in individual cases. Our argument here, however, is that the court of appeals erred in ignoring the very factors cited in *Fleuti* as relevant to a proper resolution of the question, and in focusing instead on a factor—hardship—addressed elsewhere in the statute. Hence, wherever the line between meaningful and nonmeaningful departures

may be, it is not where the court below drew it. The court of appeals lost sight of the fact that the *Fleuti* test was meant to protect aliens from the "unsuspected risks and unintended consequences of * * * wholly innocent action." *Rosenberg* v. *Fleuti*, *supra*, 374 U.S. at 462.

Thus, despite the fact that, under the standards enunciated in *Fleuti*, respondent's absence was neither innocent, casual nor brief (see pages 16-19, *supra*), the court of appeals held that these factors "are 'only evidentiary' as to whether an absence breaks the continuity of seven years presence" (Pet. App. 6a). According to the court below, the proper approach is to view the circumstances "in their totality" in light of the underlying statutory purpose (*ibid.*).[13] Applying this approach in *Kamheangpatiyooth*, the court of appeals observed that "[a]n absence of six or even 16 months does not interrupt the requisite continuity of physical presence as a matter of law." 597 F.2d at 1258.[14] In addition, the

[13] As noted above (see pages 25-26, *supra*), the court's perception of the underlying statutory purpose is wholly speculative and without support in the statutory language or history.

[14] In support of this observation, the court in *Kamheangpatiyooth* pointed out that Congress replaced the continuity of residence requirement in the predecessor to Section 244(a)(1) with the current "continuous physical presence" requirement in response to complaints by INS field officers that the residence provision had been construed to permit an alien who had been out of the United States for as long as two years during the preceding seven years to apply for suspension of deportation. 597 F.2d at 1258 n.6. According to the court, "[t]his suggests that two-year absences might bar relief, if indeed it would be consistent with Congress's overall purposes to read any specific period, standing alone, as conclusively barring relief." *Ibid.* This reasoning is fallacious. It is absurd to conclude that, because Congress was motivated to enact the "continuous physical presence" requirement by reported instances of extreme abuses arising under the prior statute, the requirement was meant to

court in *Kamheangpatiyooth* stated that in some circumstances, the fact that an alien has obtained travel documents prior to departure "may confirm the essential continuity of his presence in this country and the lack of any reasonable basis for anticipating that the planned absence might imperil his status." *Id.* at 1259. In sum, according to the court of appeals, the *Fleuti* factors may be disregarded whenever the reviewing court concludes, on the basis of whatever circumstances—such as "hardship"—it cares to invoke, that the alien has satisfied the underlying "purpose" of the statute.

Under the approach adopted by the court of appeals in this case and in *Kamheangpatiyooth*, therefore, it would be virtually impossible to conclude in any given case that an alien has made a meaningful departure. As a result of this approach, few if any lawful permanent resident aliens who leave the United States would be excludable at the border pursuant to 8 U.S.C. 1225 and 1226, because they may not be regarded as making an "entry" on their return. See *Landon* v. *Plasencia*, No. 81-129 (Nov. 15, 1982), slip op. 9. In addition, under the court of appeals' approach, the INS would be hampered in its ability to deport aliens whose deportability is dependent on an event occurring within a particular peri-

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apply *only* to equally extreme situations. Such a conclusion essentially ignores the terms "continuous" and "physical" in the statute and transforms the seven-year "continuous physical presence" requirement into a seven-year "presence" requirement. Furthermore, as noted above (see pages 23-24, *supra*), we believe that the legislative history supports a narrow construction of the "continuous physical presence" requirement. Thus, we emphatically disagree with the court of appeals' observation in *Kamheangpatiyooth* that "[i]f Congress intended an outer limit on the length of noninterruptive absence, the circumstances leading to the 1952 amendment to the Act indicate that limit was not near the 30-day range." 597 F.2d at 1258 n.6.

od of time following an "entry." See 8 U.S.C. 1251(a)(3), (4), (8), (13), (15).

As the Fourth Circuit pointed out in *McColvin* v. *INS*, *supra*, 648 F.2d at 938, "[t]he criteria laid down in *Kamheangpatiyooth* clearly gave rise to a broader interpretation of 'continuous' than the *Fleuti* Court gave to 'intended.'" This result is ironic because the statute at issue in *Fleuti* was designed "to ameliorate the severe effects of the strict 'entry' doctrine" (374 U.S. at 462) with respect to lawful permanent resident aliens, whereas the "continuous physical presence" requirement in Section 244(a)(1) was meant "to discontinue lax practices and discourage abuses" (H.R. Rep. No. 1365, *supra*, at 31) with respect to deportable aliens. In this case, the court of appeals nevertheless concluded that deportable aliens who have illegally overstayed their visas and have used deceptive means to gain reentry following a substantial absence will be eligible for the "exceptional * * * remedy" (*INS* v. *Wang*, *supra*, 450 U.S. at 145) of suspension of deportation.

The fundamental problem with the court of appeals' approach is that, having started from the erroneous premise that the statute is to be "generously construed," the court has expanded its interpretation of the "continuous physical presence" requirement in successive cases until the actual language of the statute has become largely irrelevant to the result reached in any given case. One need not subscribe to the view that the "continuous physical presence" language of Section 244(a)(1) was meant to be interpreted literally in order to conclude that the court of appeals has simply gone too far in holding that an alien such as respondent, who left the United States for *three months* and misrepresented her status in order to return to this country, has met the "continuous physical presence" requirement of the statute.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General
D. LOWELL JENSEN
Assistant Attorney General
KENNETH S. GELLER
Deputy Solicitor General
ELLIOTT SCHULDER
Assistant to the Solicitor General

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No. 82-91
IN THE

Supreme Court of the United States

October Term, 1982

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

vs.

PADUNGSRI PHINPATHYA,
Respondent.

BRIEF FOR THE RESPONDENT.

FRANK, GREENBERG, SIMONE & WINSTON,
BERT D. GREENBERG
MARTIN SIMONE
DANIEL G. GOLD
8484 Wilshire Boulevard,
Suite 730,
Beverly Hills, Calif. 90211,
(213) 655-4900,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Question Presented.

Whether respondent's three-month absence from the United States may be considered meaningfully interruptive of her "continuous physical presence" in this country, for the purpose of determining eligibility for suspension of deportation pursuant to 8 U.S.C. 1254(a)(1), even though the absence did not reduce the severity of the hardships associated with her deportation.

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No. 82-91

IN THE

Supreme Court of the United States

October Term, 1982

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

vs.

PADUNGSRI PHINPATHYA,

Respondent.

BRIEF FOR THE RESPONDENT.

I.

THE ISSUE FOR WHICH CERTIORARI HAS BEEN GRANTED IS A MOOT ISSUE.

This Court has succinctly examined the mootness doctrine in *North Carolina v. Rice*, 404 U.S. 244, 246 (1971), wherein it stated:

> ". . . [R]esolution of the question [of mootness] is essential if federal courts are to function within their constitutional sphere of authority. Early in its history, this Court held that it had no power to issue advisory opinions, *Hayburn's Case*, 2 Dall. 409 (1792), as interpreted in *Muskrat v. United States*, 219 U.S. 346, 351-353 (1911), and it has frequently repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them. *Oil Workers Unions v. Missouri*, 361 U.S. 363, 367 (1960). To be cognizable in a federal court, a suit 'must be definite and concrete, touching

> the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241 (1937). However, '[m]oot questions require no answer.' *Missouri, Kansas & Texas R. Co. v. Ferris*, 179 U.S. 602, 606 (1900). Mootness is a jurisdictional question because the Court 'is not empowered to decide moot questions or abstract propositions,' *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920), quoting *California v. San Pablo & Tulare R. Co.*, 149 U.S. 308, 314 (1893); our impotence 'to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.' *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n. 3 (1964).'' 404 U.S. at 246.

The Article III case or controversy concept requires that an actual controversy must be extant at all stages of appellate or certiorari review and not just when the action is initiated. For that reason, the issue of mootness can be raised at any time, even for the first time, at the Supreme Court level. *DeFunis v. Odegard*, 416 U.S. 312 (1974).

Review by this Court was sought by the Immigration and Naturalization Service of one issue only. The Immigration and Nauralization Service seeks review of the finding of the United States Court of Appeals for the Ninth Circuit that respondent has satisfied the seven years continuous physical presence requirement of the Immigration and Nationality Act, Section 244 (8 U.S.C. § 1254(a)(1)).

The Immigration and Nationality Act, Section 244 (8 U.S.C. § 1254(a)(1)) provides for application for suspension of deportation of a deportable alien who

> "[1] has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, . . . [2] proves that during all such period he was and is a person of good moral character; and [3] is a person whose deportation would, in the opinion of the Attorney General result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. . . ."

The Immigration Judge and the Court of Appeals both concluded that respondent satisfied the good moral character and extreme hardship requirements of 8 U.S.C. § 1254(a)(1), and the Immigration and Naturalization Service has not challenged those findings. Only respondent's fulfillment of the seven years continuous physical presence requirement is challenged.

As is clear from the record below, the issue focuses around whether respondent's departure in early 1974 was "meaningfully interruptive" of her continuous physical presence in the United States dating from October, 1969.

However, the factual circumstances of respondent's case have changed materially since the last administrative proceedings before the Board of Immigration Appeals. Respondent does not refute the fact that she last entered the United States on April 24, 1974, as that fact was established at her deportation hearing before Immigration Judge Robert T. Griffin on September 6, 1978. Consequently, the length of time which has lapsed since respondent's last entry into the United States is now a period in excess of eight years.

Since respondent can now unquestionably prove that she has been "physically present in the United States for a continuous period of not less than seven years", Immigration and Nationality Act, Section 244 (8 U.S.C.

§ 1254(a)(1)), and since the remaining two requirements for the relief of suspension of deportation have previously been found to exist by the immigration judge (*i.e.*, respondent's good moral character and extreme hardship to her United States citizen children), the undeniable conclusion is that respondent is statutorily eligible for the relief sought.

On February 3, 1983, based on the new and material fact that she has now satisfied the continuous physical presence requirement of 8 U.S.C. § 1254(a)(1) respondent moved the Board of Immigration Appeals to reopen her deportation proceedings in order that her application for suspension of deportation may be granted at this time. Such reopening is appropriate under 8 C.F.R. § 3.2,[1] since the relief of suspension of deportation is now "sought on the basis of

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[1]8 C.F.R. § 3.2 provides:

"The Board may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly authorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefor was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. A motion to reopen or a motion to reconsider shall not be made by or in behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States. Any departure from the United States of a person who is the subject of deportation proceedings occurring after the making of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion. For the purpose of this section, any final decision made by the Commissioner prior to the effective date of the Act with respect to any case within the classes of cases enumerated in § 3.1(b)(1), (2), (3), (4), or (5) shall be regarded as a decision of the Board."

circumstances which have arisen subsequent to the hearing." 8 C.F.R. § 3.2.

Respondent's deportation can be suspended by the administrative agency notwithstanding any decision by this Court on the issue before it. Respondent, therefore, urges this Court to dismiss this action, as the issue of whether respondent's departure from the United States in 1974 was "meaningfully interruptive" of her earlier claimed seven years continuous physical presence is now a moot issue.

DeFunis v. Odegard, supra, involved the question of mootness in circumstances analogous to the instant case. DeFunis, a law school student had challenged the constitutionality of the law school's admission policy, and the trial court ordered him admitted to the school. On appeal, the Washington State Supreme Court reversed and DeFunis sought Certiorari in this Court. Pending determination by the Court, Mr. Justice Douglas stayed the judgment of the State Supreme Court with the result that DeFunis was in his last semester of law school when his case reached this Court. Additionally, the law school had made assurances that regardless of the outcome of the case in this Court, DeFunis would be allowed to finish law school.

The Court concluded that:

> "Because the petitioner will complete his law school studies at the end of the term for which he has now registered regardless of any decision this Court might reach on the merits of this litigation, we conclude that the Court cannot, consistently with the limitation of Art. III of the Constitution, consider the substantive constitutional issues tendered by the parties." 416 U.S. at 320.

Such was the holding of this Court notwithstanding the suggestion by dissenting justices that any number of un-

expected events might preclude DeFunis' graduation at the scheduled time.

In Footnote 5 the Court stated:

> " 'But such speculative contingencies afford no basis for our passing on the substantive issues [the petitioner] would have us decide,' *Hall v. Beals*, 396 U.S. 45, 49 (1969), in the absence of 'evidence that this is a prospect of "immediacy and reality." ' *Golden v. Zwickler*, 394 U.S. 103, 109 (1969); *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)".
>
> *DeFunis v. Odegard, supra*, at 320, note 5.

Since the deportation of respondent can be suspended "regardless of any decision this court might reach on the merits of this litigation", *DeFunis v. Odegard, supra*, at 319, respondent urges the Court to dismiss this action as moot.

II.

THE SUSPENSION OF DEPORTATION PROVISION MUST BE LIBERALLY CONSTRUED IN ORDER TO SATISFY ITS LEGISLATIVE PURPOSE AS AN EQUITABLE AND AMELIORATIVE REMEDY.

This action brings into question the Attorney General's interpretation of that provision in the Immigration and Nationality Act (8 U.S.C. §§ 1101 *et seq.*) which gives the Attorney General discretion to suspend an otherwise mandatory deportation of an alien and to adjust that alien's status

to that of a lawful permanent residence. Immigration and Nationality Act Section 244(a)(1) (8 U.S.C. § 1254(a)(1)).[2]

One of the three criteria for exercise of that discretion is that the alien "has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of [his] application." 8 U.S.C. § 1254(a)(1). At issue is whether such a criterion must be narrowly construed or whether a liberal construction is more consistent with Congressional intent.

In vetoing the Immigration and Nationality Act of 1952, in part because the criteria enumerated for suspension of deportation were more restrictive than those found in the predecessor law, President Harry S. Truman recognized the function of the discretion given the Attorney General to be to grant "relief from the letter of the law." In reaction to the restrictive nature of the remedy contained in the 1952 Act he stated, "This is most unfortunate, because the bill, in its other provisions, would impose harsher restrictions and greatly increase the number of cases deserving equitable relief." 98 Cong. Rec. 8225 (H. Doc. 520), President's Veto Message to Congress on June 25, 1952, explaining

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[2]Immigration and Nationality Act, § 244(a)(1), 8 U.S.C. § 1254(a)(1) provides:

> "(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and —
>
> (a) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence."

reasons for vetoing H.R. 5678. Thus, the executive branch of the federal government noted the equitable nature of the suspension of deportation provision and the appropriateness of a liberal construction of the provision in determining eligibility for such relief.

The Court of Appeals for the Ninth Circuit has also concluded, based on the purpose of the statute, that:

> "[i]n construing § 244 [8 U.S.C. § 1254(a)(1)] we are in an area in which strict construction is peculiarly inappropriate. The apparent purpose of the grant of discretion to the Attorney General is to enable that officer to ameliorate hardship and injustice which otherwise would result from a strict and technical application of the law. A strict and technical construction of the language in which this grant of discretion is couched could frustrate its purpose. A liberal construction would not open the door to suspension of deportation in cases of doubtful merit. It would simply tend to increase the scope of the Attorney General's review and thus his power to act in amelioration of hardship." *Wadman v. INS*, 329 F.2d 812 (9th Cir. 1964) at 816.

Another circuit court of appeal further stated that since this Court's decision in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963) (see discussion, *infra*) and the Ninth Circuit decision in *Wadman v. INS*, *supra*, the word "continuous" has not been subject to a "hard and fast construction." *McColvin v. INS*, 648 F.2d 935 (4th Cir. 1981) at 937.

The court in *McColvin* recognized the inappropriateness of a rigid construction:

> "The parties in the present case agree that the continuous physical presence requirement may be relaxed in an appropriate case. They differ, however, on the degree of relaxation that should be allowed and on whether this case is an appropriate one for such relaxation." 648 F.2d at 937.

In discussing the suspension of deportation statute, 8 U.S.C. § 1254(a)(1), in conjunction with 8 U.S.C. § 1101(a)(13) (see footnote 2, *supra*), the court stated in *Kamheangpatiyooth v. INS*, 597 F.2d 1253 (9th Cir. 1979):

> "Both sections therefore must be interpreted in light of the congressional purpose. Both sections are remedial, and hence are to be generously construed. More specifically, both sections are intended to relieve aliens of the harsh results, and of the unsuspected risks and unintended consequences, that would flow from a literal and rigid application of the provisions of the Act relating to expulsion and exclusion." 597 F.2d at 1256.

In addition to executive and judicial branch interpretations, the legislative history itself shows that Congress' intent in enacting the suspension of deportation statute was remedial in nature and meant to ameliorate the hardship of deportation:

> "It is the information of the committee that there are a number of worthy cases in which persons, deportable on technical grounds, have lived in the United States for many years, but have no close family ties so as to enable them to become eligible for discretionary relief. . . . It is only just that other persons in this category who have not been favored by the introduction of private bills should have their cases considered for relief." S. Rep. No. 1204, 80th Cong., 2d Sess. (1948).

And prior to the amendment of the Immigration and Nationality Act in 1948, which extended suspension of deportation to aliens who had seven or more years residence in the United States, "Immigration and Naturalization Service officials stated that the law was too stringent. . . ." S. Rep. No. 1515, 81st Cong., 2d Sess. (1950).

Also, as pointed out in the Ninth Circuit decision in *Kamheangpatiyooth v. INS, supra*, a liberal interpretation of the continuous physical presence requirement would not result in a reduction of the exceptional quality of the remedy.

> "A generous construction of the continuous presence requirement of § 244(a)(1) is also especially appropriate because it will not require relief to be granted where relief may be unwarranted. Indeed, a liberal construction will not require the granting of relief in any case; it will only allow the Attorney General to review the case on the merits and to decide whether in his discretion relief in fact would be warranted." 597 F.2d at 1256, footnote 3.

As petitioner has pointed out, prior to the enactment of the Immigration and Nationality Act of 1952 (8 U.S.C. §§ 1101 *et seq.*):

> ". . . the Senate Committee on the Judiciary noted that INS field officers had criticized the administrative interpretation of the 7-year residence provisions of the law. These provisions have been held applicable to an alien who has a total of 7 years' residence in the United States, although the alien has been out of the United States for as long as 2 years during the last 7 years. S. Rep. No. 1515, 81st Cong., 2d Sess. 602 (1950). Two years later, in an attempt to discontinue lax practices and discourage abuses (H.R. Rep. No. 1365, 82nd Cong., 2d Sess. 31 (1952), Congress amended the suspension of deportation statute to require seven years' continuous *physical presence* in the United States. [footnote omitted]" (Pet. Br. 23-24).

It is possible for the 1952 Act to stem the abuses complained of above and yet maintain the integrity of the original ameliorative intent of Congress in enacting the suspension of deportation provision. Too narrow an interpretation of the continuous physical presence requirement would result

in an overbroad application, disqualifying aliens whose cases are worthy of "consideration for relief," S. Rep. No. 1204, 80th Cong., 2d Sess. (1948), and whose cases involve none of the abuses the new law was created to discourage.

A better interpretation of the physical presence requirement would mandate that the Attorney General use his discretion to investigate and evaluate the totality of circumstances to determine whether a departure is meaningfully interruptive of the required seven years physical presence. The very nature of this remedy, which was spawned in the pond of equity to provide protection from the harsh inflexibility of a predatory statute, leads to this conclusion.

The history and intent of the statute suggest that its application be based upon an evaluation of the circumstances of each case, rather than strict adherence to the letter of the law.

III.

RESPONDENT HAS DEMONSTRATED THAT HER DEPARTURE IN 1974 WAS NOT MEANINGFULLY INTERRUPTIVE OF HER SEVEN YEARS CONTINUOUS PHYSICAL PRESENCE UNDER THE TEST ANNOUNCED BY THIS COURT IN *ROSENBERG v. FLEUTI*.

A. The Test Adopted by This Court in *Rosenberg v. Fleuti* to Determine Whether a Departure Is "Meaningfully Interruptive" of Continuous Physical Presence Is a "Totality of Circumstances Test."

This Court's decision in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963) was decided in the context of Immigration and Nationality Act, Section 101(a)(13) (8 U.S.C. § 1101(a)(13)),[3]

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[3]Immigration and Nationality Act, Section 101(a)(13), 8 U.S.C. § 1101(a)(13) provides:

> "The term 'entry' means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes

(footnote continued on following page)

to determine whether a lawful resident of the United States "intended" a departure from the United States. This Court held that the resident alien did not intend the departure unless he departed "in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence." 374 U.S. at 462. Thus, the test laid down by this Court in *Fleuti*, was whether the resident *intended* his departure to be *meaningfully interruptive* of his permanent residence.

This Court detailed the analysis to be used in applying the "meaningfully interruptive" test in this manner:

> "One major factor relevant to whether such intent can be inferred is, of course, the length of time the alien is absent. Another is the purpose of the visit, for if the purpose of leaving the country is to accomplish some object which is itself contrary to some policy reflected in our immigration laws, it would appear that the interruption of residence thereby occurring would properly be regarded as meaningful. Still another is whether the alien has to procure any travel documents in order to make his trip, since the need to obtain such items might well cause the alien to consider more fully the implications involved in his leaving the country. Although the operation of these and other possible relevant factors remains to be developed 'by the gradual process of judicial inclusion and exclusion,' [citation omitted], we declare today simply that an innocent, casual, and brief excursion by a resident alien outside

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of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: *Provided*, That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception."

> this country's borders may not have been 'intended' as a departure disruptive of his resident alien status. . . ." 374 U.S. at 462.

Since the decision of the United States Court of Appeals for the Ninth Circuit, in *Wadman v. INS, supra*, the principles laid down by this Court in *Rosenberg v. Fleuti, supra*, have been applied in determining whether the alien has met the continuous physical presence requirement of 8 U.S.C. § 1254(a)(1). In *Wadman*, the Ninth Circuit stated:

> "In our judgment the term 'continuous' is no more subject to a hard and fast construction than is the term 'intended'. The question is whether the interruption, viewed in balance with its consequences, can be said to have been a significant one under the guides laid down in *Fleuti*." 329 F.2d at 816.

The Ninth Circuit, in *Wadman*, held that the alien's five day vacation trip to Mexico could not be found, as a matter of law, to be "meaningfully interruptive" of an otherwise continuous seven and one-half years physical presence in the United States.

Therefore, the test to be applied since the *Wadman* decision in 1964 that the test to be applied to determine whether a departure breaks continuity of physical presence in the United States for purposes of 8 U.S.C. § 1254(a)(1) is whether the departure can be characterized as having been "meaningfully interruptive" of that presence.

Closer examination of the factors enumerated by this Court in *Fleuti* is required to understand the true thrust of this Court's formulation in that case.

1) length of time.

The *Fleuti* Court stated that the length of time the alien is absent is "one major factor" to be considered in determining whether he intended the departure to be "meaning-

fully interruptive". The Court did not state that any particular length of time was short enough to determine conclusively that the departure was not meaningfully interruptive, nor did it state any specific length of time from which it would conclude that the absence was meaningfully interruptive. The fact in the *Fleuti* case was that the alien had been absent from the United States for a period of only "about a couple of hours", 374 U.S. at 450. Therefore, in paraphrasing its "length of time" factor, the Court stated that Fleuti's absence was "brief".

2) purpose of the visit.

The Court identified the purpose of the trip as an important factor to be considered in determining the resident alien's intent to depart in a manner which would be regarded as meaningfully interruptive of his residence. ". . . [F]or if the purpose of leaving the country *is to accomplish some object which is itself contrary to some policy reflected in our immigration laws*, it would appear that the interruption of residence thereby occurring would possibly be regarded as meaningful." 374 U.S. at 462 [emphasis added]. This factor was paraphrased by the Court, perhaps unfortunately, as "innocent", and subsequent inferior courts have abandoned the true character of the "purpose of the visit" factor, and substituted the factor of whether the entire trip was innocent of any wrongdoing whatsoever.

This Court in *Fleuti* was concerned with whether the alien's absence was occasioned by the express desire of accomplishing some objective contrary to the immigration policy of the United States, for example, for the purpose of smuggling illegal aliens into the United States. By dropping the "purpose of the visit" language and focusing on the "innocent" paraphrase, subsequent courts have been preoccupied with determining whether the alien's actions,

from departure to return, were innocent of any breach of law or regulation. This is far afield from this Court's original statement of the "purpose of the visit" factor.

In *Fleuti*, the resident alien had apparently crossed the border into Mexico simply for the purpose of taking a trip. 374 U.S. at 463. The Court concluded that if, in fact, that was the purpose of his visit, and that it was also brief and casual, that he did not intend to interrupt his residence in the United States by his departure.

3) procurement of travel documents.

This Court identified this factor to be significant since the necessity of obtaining passports and visas "might well cause the alien to consider more fully the implications involved in his leaving the country." 374 U.S. at 462. This factor was paraphrased by the Court as "casual".

4) other possibly relevant factors.

The recognition by this Court that factors other than the three specifically listed above may be relevant to a determination of whether an absence is "meaningfully interruptive" in subsequent cases indicates that this Court was, in fact, stating a totality of circumstances test. This Court determined that in Fleuti's case, the relevant factors to be considered in determining his intention were those three specifically stated above. Further, the Court did not state that an absence would have to be "innocent, casual and brief" to indicate a lack of intent to depart, but rather, that considering the facts of Fleuti's case, such an absence could not be considered meaningfully interruptive. This Court perceptively realized and made it clear in its opinion, that in determining the intent of an individual, the entirety of the circumstances surrounding his action must be consid-

ered. To reduce the holding of *Rosenberg v. Fleuti* to a simple "innocent, casual and brief" dogma is to ignore the major thrust of that opinion.

B. The "Diminished Hardship" Factor Utilized by the United States Court of Appeals for the Ninth Circuit in *Kamheangpatiyooth v. INS* and Applied in Respondent's Case Is a Logical and Permissible Application of This Court's Decision in *Rosenberg v. Fleuti*.

As has been discussed, *supra*, the holding of this Court in *Rosenberg v. Fleuti, supra*, was not that the three factors found to be relevant in that case be rigidly applied to all subsequent cases. Rather, this Court held that the ultimate test is whether the departure can be ". . . regarded as meaningfully interruptive. . . ." 374 U.S. at 462.

In order to determine whether an absence is "meaningfully interruptive" for purposes of 8 U.S.C. § 1254(a)(1), it is important to identify the Congressional purpose in creating the seven years continuous physical presence requirement. The Ninth Circuit in *Kamheangpatiyooth v. INS*, 597 F.2d 1253 (9th Cir. 1979) explained:

> "It was Congress's judgment that presence of that length was likely to give rise to a sufficient commitment to this society through establishment of roots and development of plans and expectations for the future to justify an examination by the Attorney General of the circumstances of the particular case to determine whether deportation would be unduly harsh [footnote omitted]. Continuity in the prescribed period of physical presence was required because continuity is important to the legitimacy of the inference that extended presence is likely to make deportation harsh. Presence that is only intermittent suggests the alien has not become so attached to this country that the authorities

should consider suspending normal operation of the immigration laws on his behalf. . . . Conversely, interruptions that are brief and infrequent do not diminish the probability that deportation would occasion undue hardship. An alien who leaves the country briefly and for innocent reasons during the requisite seven years may be in no different position, realistically viewed, than an alien who has remained within the borders for an identical period." 597 F.2d at 1256, 1257.

The court continued:

"To effectuate the purposes underlying the continuous period requirement, and to realize Congress's desire (identified in *Fleuti*) to avoid exposing aliens to unexpected risks and unintended consequences, the Board must determine whether a particular absence during the seven-year period reduced the significance of the whole period as reflective of the hardship and unexpectedness of expulsion. An absence cannot be significant or meaningfully interruptive of the whole period if indications are that the hardship of deportation to the alien would be equally severe had the absence not occurred. . . ." *Kamheangpatiyooth v. INS*, 597 F.2d at 1257.

The Ninth Circuit is not alone in suggesting the use of the "diminished hardship" factor in determining the significance of a departure during the required seven year period. In *Heitland v. INS*, 551 F.2d 495 (2nd Cir. 1977), the Second Circuit explained:

". . . deportation of an alien who had accumulated seven years of fragmented residence in the United States, interrupted by frequent or long absences abroad, would not be expected to work as much hardship upon him as might result if he had resided in this country for an unbroken seven-year period, since the latter might reduce the likelihood of his being able to estab-

> lish his home elsewhere. The statute surely was not designed to protect the wanderers or the rootless. Hence, Congress used the word 'continuous.' On the other hand, to deny a person the benefits of seven years' continuous residence because of one or two short interruptions might well defeat the purpose of § 244(a)(1), *since the hardship in such a case would not be substantially different from that where the presence has been uninterrupted.*" *Heitland v. INS*, *supra*, at 501 [emphasis added].

Thus, in determining whether an absence is "meaningfully interruptive" of an alien's seven years continuous physical presence, an important factor to consider under the *Fleuti* totality of circumstances test, is what effect the absence had on the significance of the entire period spent in the United States; whether the absence was of such a nature as to alleviate or lessen the urgency of availing the alien of the relief of suspension of deportation.

Petitioner argues that in considering the factor of "diminished hardship", the Ninth Circuit has collapsed the seven year continuous physical presence requirement into the extreme hardship requirement, thereby effectively writing the seven year requirement out of the statute. (Pet. Br. 27). Respondent urges that the Ninth Circuit has only identified the "diminished hardship" factor as being one of the factors to be taken into consideration in determining whether an absence is sufficiently significant to be "meaningfully interruptive" of an otherwise continuous physical presence. In this context, the factor applies only to the significance of the absence *vis a vis* the seven year presence, notwithstanding the fact that a showing of extreme hardship is a separate and distinct requirement of the relief of suspension of deportation.

If, by his absence, an alien significantly diminishes the hardship which would ensue upon expulsion after an otherwise unbroken seven year period, it would follow that the absence destroys the significance of the whole seven period and should be found meaningfully interruptive. Conversely, however, if by his absence, the alien in no way diminishes the hardship which he would suffer upon deportation after an otherwise continuous seven year physical presence in the United States, the absence cannot be considered meaningfully interruptive without thwarting the Congressional purpose behind 8 U.S.C. 1254(a)(1).

For example, if the alien departs to his home country or a third country and sets up housekeeping, or accepts employment, or establishes or renews familial or other social ties in that country, certainly it could be inferred that expulsion from the United States would not cause as extreme a hardship upon the alien as if he had made only a brief trip to a third country for the purpose of visiting a family member or seeing the sights of that country. This is so, since, by his own actions, the alien has *increased* "the likelihood of his being able to establish his home elsewhere." *Heitland v. INS, supra*, 551 F.2d at 501. If, however, the alien has not in any way taken action or manifested an intent to withdraw or supplant the roots he has established in this country, this factor should be considered in determining whether his absence has meaningfully interrupted his continuous presence in the United States.

In this context, the objective manifestations of the alien's intent to break the continuity of his presence in the United States by uprooting himself from the United States or establishing himself elsewhere are integral factors to be taken into consideration in a totality of circumstances test. These objective manifestations of intent are easily identifiable factual realities, not self-serving statements by the alien after

the fact regarding his intention in departing the United States. Objective manifestations include such factors as whether the alien left real and/or personal property in the United States; whether immediate family members remained in the United States; the purpose of the alien's trip outside the United States; the purpose of the alien's return to the United States; and actions taken by the alien outside the United States which would indicate an intention to remain abroad.

Without taking into consideration all of the relevant circumstances surrounding the absence of the alien, it would be impossible for an immigration judge, the Board of Immigration Appeals, or a reviewing court to determine whether or not a given departure is "meaningfully interruptive" of an alien's physical presence in the United States.

C. Examination of the Totality of Circumstances Surrounding Respondent's Departure in 1974 Establishes That Her Three Month Absence Was Not Meaningfully Interruptive of Her Otherwise Continuous Physical Presence in the United States Dating From October, 1969.

Respondent's absence was "brief" under the guidelines set by this Court in *Rosenberg v. Fleuti*. Having entered the United States in October, 1969, and remaining here continuously, respondent absented herself from the United States for a period of approximately three months, from January, 1974, to April, 1974. (J.A 17) This three month period, when viewed in perspective of the total time that respondent has spent in the United States, is de minimis and consequently, brief.

The Order to Show Cause was issued against respondent in January 1977. (J.A. 29) This would indicate that from the time respondent first entered the United States until the

time proceedings were commenced against her by the Immigration and Naturalization Service, a period of seven years and four months had lapsed, or equivalently, 88 months. Respondent was absent for a three month period out of a total period of 88 months, or approximately three percent of the total lapsed period. When viewed in this perspective, the three month period can certainly be considered to be "brief".

Further, as of the date of commencement of proceedings in this Court on July 16, 1982, the total time lapsed since respondent first entered the United States is a period of twelve years and nine months, *i.e.*, 153 months. The three month absence represents less than two percent of that total period.

Respondent's purpose in making the visit abroad was purely innocent. Respondent testified that she had returned to Thailand for the three month period to visit her sick mother. (J.A. 17) The purpose of such a trip certainly was not to "accomplish some object which is itself contrary to some policy reflected in our immigration laws." *Rosenberg v. Fleuti*, 374 U.S. at 462.

Petitioner states in its Petition for a Writ of Certiorari, that although the Ninth Circuit recognized that the trip was for the purpose of visiting the sick mother, that there was no evidence in the record that respondent's mother was actually sick at the time of the trip, or that her mother's illness was the reason that respondent traveled to Thailand. (Petition, p. 7, note 5).

Assuming, *arguendo*, that respondent's trip was not for the purpose of visiting her sick mother, petitioner nonetheless does not suggest that the trip was for any illegal purpose, or for any purpose contrary to the United States immigration policy. Even if the trip was purely a social visit to see friends

and relatives in Thailand, a visit for such purpose is not counter to any United States immigration policy. Petitioner does not suggest that respondent departed the United States in order to smuggle illegal aliens or to accomplish any other unlawful purpose.

The third factor specifically mentioned in *Fleuti* is whether travel documents had to be obtained prior to the trip. This factor, though relevant to the issue of whether a legal permanent resident "intended" a departure under 8 U.S.C. § 1101(a)(13), is of questionable relevance when the issue is whether the circumstances surrounding a departure indicate whether that departure is "meaningfully interruptive" of a seven years continuous physical presence under 8 U.S.C. § 1254(a)(1). This is so, as the two statutes generally effect individuals in entirely different circumstances. 8 U.S.C. § 1101(a)(13), by definition, addresses itself only to aliens who are legal permanent residents of the United States. By contrast, 8 U.S.C. § 1254(a)(1) is almost always applied to aliens who have not been admitted for permanent residence and usually to individuals who have overstayed a visa or even entered the United States without a visa altogether. Indeed the relief is available only to aliens who have been found to be deportable from the United States. Since the issue under 8 U.S.C. § 1254(a)(1) is not whether the departure was "intended" but, rather, what the effect of the departure is on the overall significance of an otherwise uninterrupted seven years physical presence, the issue of the necessity of obtaining travel documents does not aid in the analysis. There is no question that respondent "intended" her departure; the issue is the relevance of that departure to her continuous physical presence in the United States.

An additional factor identified by the Ninth Circuit in *Kamheangpatiyooth* and the Second Circuit in *Heitland* as

being relevant to the significance of a departure under 8 U.S.C. § 1254(a)(1), and discussed *supra*, is whether the hardship to be suffered upon deportation has been diminished by the alien's absence from the United States. As discussed above, this factor is relevant to an understanding and evaluation of the totality of circumstances surrounding the absence, an issue completely independent of whether extreme hardship can be proven as is also required by 8 U.S.C. § 1254(a)(1).

Respondent, by her three month absence, in no way diminished the hardship which she or her United States citizen children would suffer if she were to be deported from the United States. She took no action, nor did she manifest any intention to disentangle herself from roots established in the United States or to re-establish her roots abroad. She did not liquidate her household in the United States and establish a new one abroad; in fact she left real estate and most of her personal belongings in the United States. Respondent did not take up employment abroad, nor did she acquire property. She left her husband in the United States in order that she could take a brief trip to Thailand to visit her ailing mother and at all times intended to return to the United States to be reunited with him. (JA 17-19) By her three month trip to Thailand, respondent in no way increased the likelihood that she could establish a new home abroad without suffering the extreme hardship which 8 U.S.C. § 1254(a)(1) was enacted to ameliorate.

Thus, the totality of the circumstances surrounding respondent's three month absence from the United States indicates that respondent's absence was not sufficiently significant to be "meaningfully interruptive" of an otherwise seven years continuous physical presence in the United States.

IV.
CONCLUSION.

Not only for the benefit of respondent, but also to ensure the integrity and utility of the law as intended by Congress and interpreted by the courts, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

FRANK, GREENBERG, SIMONE & WINSTON,
BERT D. GREENBERG
MARTIN SIMONE
DANIEL G. GOLD
Attorneys for Respondent.

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No. 82-91

In the Supreme Court of the United States

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

PADUNGSRI PHINPATHYA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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1. Respondent contends (Resp. Br. 1-6) that the case is moot.[1] She asserts that since her return from Thailand in April 1974, she has been physically present in the United States for a continuous period of more than seven years. Respondent claims that she is statutorily eligible for suspension of deportation because she now can satisfy the "continuous physical presence" requirement of Section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1254(a)(1). On February 3, 1983, respondent sought to establish her eligibility for suspension of deportation by filing with the Board of Immigration Appeals a motion to reopen her deportation proceeding based on her assertion of a new and material fact — *i.e.*, that she has been physically present in this country since April 1974. In light of

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[1]This contention is also made by amicus curiae American Immigration Lawyers Association.

these developments, respondent argues that there is no need for this Court to decide the "continuous physical presence" issue here because even if the Court were to reverse the judgment of the court of appeals, respondent nonetheless could prevail on that issue before the BIA if the Board were to grant her motion to reopen.

Respondent's mootness contention is manifestly without merit for a number of reasons. To begin with, the case is clearly not moot because the BIA has not yet passed on respondent's motion to reopen, much less found her to have met the "continuous physical presence" requirement.[2] In addition, while it is of course true that more than seven years have elapsed since respondent's April 1974 entry, we have no way of knowing whether respondent could sustain her statutory burden of demonstrating that she has been physically present in the United States for a continuous period of at least seven years. Certainly, nothing in the record of this case provides a basis for concluding that respondent could meet this burden, and counsel's unsupported assertions in respondent's brief similarly do not establish that respondent could satisfy the "continuous physical presence" requirement.

Moreover, nothing in either the Immigration and Nationality Act or the regulations promulgated by the INS automatically entitles respondent to reopen her deportation proceeding for the purpose of filing yet another application for suspension of deportation. The Act itself does not expressly provide for a motion to reopen. The pertinent INS regulation, 8 C.F.R. 3.2, provides in relevant part that "[m]otions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence

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[2]On April 18, 1983, this Court denied respondent's motion to stay the proceedings in this case pending the Board's disposition of respondent's motion to reopen.

sought to be offered is material * * *." As the Court observed in *INS* v. *Wang*, 450 U.S. 139, 143-144 n.5 (1981),

> [t]he present regulation is framed negatively; it directs the Board not to reopen unless certain showings are made. It does not affirmatively require the Board to reopen the proceedings under any particular condition. Thus, the regulations may be construed to provide the Board with discretion in determining under what circumstances proceedings should be reopened.

The Court in *Wang* quoted approvingly from the dissenting opinion in *Villena* v. *INS*, 622 F.2d 1352, 1362 (9th Cir. 1980) (en banc), in which Judge Wallace concluded that the INS had discretion beyond requiring proof of a prima facie case:

> If INS discretion is to mean anything, it must be that the INS has some latitude in deciding when to reopen a case. The INS should have the right to be restrictive. Granting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case. It will also waste the time and efforts of immigration judges called upon to preside at hearings automatically required by the prima facie allegations.

Under this approach, the BIA clearly would be acting well within its discretion if it were to deny respondent's motion to reopen on the ground that the period after a finding of deportability should not be counted toward the statutory seven-year period. The Board is not required to permit deportable aliens, as a matter of course, to reopen deportation proceedings merely because they have demonstrated " 'the ability to stay out of trouble with the police for seven years.' " *INS* v. *Wang*, *supra*, 450 U.S. at 145, quoting from *Wang* v. *INS*, 622 F.2d 1341, 1352 (9th Cir. 1980)

(en banc) (Goodwin, J., dissenting). This is especially true when part of the seven-year period includes the time *following* a finding of deportability; otherwise, deportable aliens with access to legal services would have every incentive to attempt to prolong their illegal stays in this country through dilatory tactics and legal maneuvers in proceedings before the courts and the INS. See generally, *e.g.*, *LeBlanc* v. *INS*, No. 82-1829 (1st Cir. Aug. 18, 1983), slip op. 17-18; *Agustin* v. *INS*, 700 F.2d 564, 566 (9th Cir. 1983); *Muigai* v. *INS*, 682 F.2d 334, 336-337 (2d Cir. 1982); *Balani* v. *INS*, 669 F.2d 1157, 1160 (6th Cir. 1982); *Lam Chuen Ching* v. *INS*, 467 F.2d 644, 645 (3d Cir. 1972).

In sum, there is no basis for concluding that the Board will grant respondent's motion to reopen her deportation proceeding or that, if the Board grants the motion, it will determine that she is eligible for suspension of deportation. Accordingly, the case is not moot. Cf. *INS* v. *Chadha*, No. 80-1832 (June 23, 1983), slip op. 16.[3]

2. Respondent contends (Resp. Br. 6-11) that, because the suspension of deportation remedy was designed to serve a generally "ameliorative" purpose, it follows that Congress must have intended the "continuous physical presence" requirement of Section 244(a)(1) to be construed liberally. This contention is entirely without merit, largely for the reasons discussed in our opening brief (at 20-25).

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[3]Respondent seeks to have it both ways: on the one hand, she has attempted to minimize the importance of the court of appeals' ruling by arguing that she can now obtain the same relief through a different route; on the other hand, she appears reluctant to jeopardize her victory in the court of appeals by having that court's decision reviewed by this Court. If respondent were truly confident of the success of her pending motion to reopen, she could moot the instant case by simply withdrawing her initial application for suspension of deportation. Respondent, however, has not offered to withdraw her initial application.

If respondent's contention were correct, then the "extreme hardship" requirement of the statute would also be subject to a generous construction. But in *INS* v. *Wang, supra*, this Court specifically rejected such an approach when it held that the Attorney General and his delegates are authorized to construe "extreme hardship" narrowly, and that "[s]uch a narrow interpretation is consistent with the 'extreme hardship' language, which itself indicates the exceptional nature of the suspension remedy." 450 U.S. at 145. The statutory limitation of eligibility to those who can prove that they were "*physically present* in the United States for a *continuous period* of not less than seven years" prior to their application (8 U.S.C. 1254(a)(1) (emphasis added)) is a further indication that Congress intended suspension of deportation to be an exceptional remedy.

In a recent decision, the Eleventh Circuit has expressly rejected the generous construction of the "continuous physical presence" requirement that underlies the decisions of the court of appeals in this case and in *Kamheangpatiyooth* v. *INS*, 597 F.2d 1253 (9th Cir. 1979). The court in *Fidalgo/Velez* v. *INS*, 697 F.2d 1026, 1029 (11th Cir. 1983), stated:

> The broad and liberal interpretation of "meaningful interruption" developed by the Ninth Circuit in *Kamheangpatiyooth* and *Phinpathya* contravenes the plain language and the legislative history of Section 244(a)(1). See *McColvin* v. *Immigration and Naturalization Service*, 648 F.2d 935 (4th Cir. 1981) (Congress intended that continuous physical presence requirement be applied in a rigorous manner). On its face, the statute does not provide an exception to the requirement of continuous physical presence. That this omission is deliberate is demonstrated by the legislative history of Section 244(a)(1). The predecessor statute to Section 244(a)(1), Section 19(c) of the Immigration Act of 1917, 39 Stat. 874, required that an alien have

"resided continuously" in the United States for seven or more years. When the Act was revised in 1952 Congress broadened the class of aliens who may apply for suspension of deportation but made the requirements more restrictive, by substituting continuous physical presence for continuous residence and requiring a showing of exceptional and extremely unusual hardship instead of serious economic detriment. The purpose of these amendments was to "attempt to discontinue lax practices and discourage abuses." H.R. Rep. No. 1365, 82d Cong., 2d Sess. 31, *reprinted in* 1952 U.S. Code Cong. & Ad. News 1653, 1682. Congress amended the latter requirement in 1962 to require only "extreme hardship," 76 Stat. 1247, but left the physical presence requirement unchanged. If Congress had intended to permit physical absences during the seven year period, it could have required that an alien have seven years' continuous residence rather than seven years' physical presence.

Respondent does not contend, nor could she, that the language of Section 244(a)(1) supports her liberal interpretation of the "continuous physical presence" requirement. Nor does respondent rely on the legislative history of the "continuous physical presence" requirement itself, which, as the Eleventh Circuit observed in *Fidalgo/Velez*, supports a narrow construction of the statute. Instead, like the court of appeals, the only legislative history on which respondent relies (Resp. Br. 9) predates the enactment of the "continuous physical presence" provision and is therefore inapposite. See the discussion in our opening brief (at 22-24).[4]

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[4]Respondent's reliance (Resp. Br. 7-8) on President Truman's veto message is similarly misplaced, in view of the fact that Congress overrode that veto in enacting the Immigration and Nationality Act. Indeed, the President's message reflects the view that Section 244(a)(1) was

Contrary to respondent's suggestion, we do not advocate a rigid and inflexible approach to construing the statute. For example, if an alien were to depart the United States for a brief period without intending to do so (see *DiPasquale* v. *Karnuth*, 158 F.2d 878 (2d Cir. 1947)), the INS would not urge that such a departure interrupts the alien's "continuous physical presence" and renders him ineligible for suspension of deportation. In addition, although we have questioned whether the standards developed by this Court in *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963), are applicable in the suspension of deportation context, the BIA has been applying the *Fleuti* standards to determine whether an alien's trip outside the United States was "meaningfully interruptive" of the continuity of his physical presence in this country for purposes of Section 244(a)(1). See our opening brief (at 16).

Even assuming the relevance of *Fleuti* here, however, the problem with respondent's approach — and that of the court of appeals — is that it essentially ignores the "continuous physical presence" language of the statute and extends eligibility to aliens, such as respondent, whom Congress could not conceivably have intended to be eligible for

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designed to restrict the availability of suspension of deportation. See H.R. Doc. No. 520, 82d Cong., 2d Sess. 7 (1952) (emphasis added):

> The bill would sharply restrict the present opportunity of citizens and alien residents to save family members from deportation. Under the procedures of present law, the Attorney General can exercise his discretion to suspend deportation in meritorious cases. In each such case, at the present time, the exercise of administrative discretion is subject to the scrutiny and approval of the Congress. Nevertheless, *the bill would prevent this discretion from being used in many cases where it is now available, and would narrow the circle of those who can obtain relief from the letter of the law*. This is most unfortunate, because the bill, in its other provisions, would impose harsher restrictions and greatly increase the number of cases deserving equitable relief.

suspension of deportation. Indeed, the court of appeals' broad formulation of the "continuous physical presence" requirement "exceeds the flexibility permitted by *Fleuti*." *Fidalgo/Velez* v. *INS*, *supra*, 697 F.2d at 1029.

3. Respondent asserts (Resp. Br. 11-23) that her trip to Thailand was not meaningfully interruptive of her "continuous physical presence" under the standards established in *Fleuti*. In doing so, respondent concedes that her excursion outside the United States lasted three months, a substantial period of time (especially when compared to Fleuti's two-hour jaunt across the border). In addition, respondent acknowledges that, unlike Fleuti, she procured travel documents prior to her trip, thus evidencing the deliberateness with which the trip was undertaken. Respondent contends, however, that her trip was not "meaningfully interruptive" under *Fleuti* because the "purpose" of the trip was not to engage in illegal conduct and the severity of the hardship associated with her deportation was not diminished as a result of the trip. We disagree.

a. In *Fleuti*, this Court stated that "if the purpose of leaving the country is to accomplish some object which is itself contrary to some policy reflected in our immigration laws, it would appear that the interruption of residence thereby occurring would properly be regarded as meaningful." 374 U.S. at 462. Respondent does not deny that she obtained from the United States Consul in Thailand a nonimmigrant visa as the wife of a foreign student in the United States even though her husband's student visa had expired years earlier. Thus, it is undisputed that respondent knowingly misrepresented her status in order to secure reentry into this country. Nevertheless, because the specific "purpose" of respondent's trip was not to procure a reentry visa, respondent claims that her deliberate misconduct must be disregarded as not relevant on the question whether her

absence was meaningfully interruptive.[5] Respondent's strict construction of this Court's language in *Fleuti* is unavailing. As the court in *Fidalgo/Velez* recently remarked (697 F.2d at 1030):

> Any flexibility incorporated into Section 244(a)(1) to protect a resident alien from "unsuspected risks and unintended consequences" as a result of *Fleuti* and *Wadman* only extends to "wholly innocent action." *Fleuti*, 374 U.S. at 462, 83 S.Ct. at 1812. *See McColvin, supra* (one day departure under grant of voluntary deportation in lieu of deportation "meaningfully interruptive" of continuous physical presence); *Heitland* v. *Immigration and Naturalization Service*, 551 F.2d 495 (2d Cir.), *cert. denied*, 434 U.S. 819, 98 S.Ct. 59, 54 L.Ed.2d 75 (1977) (six week visit to Germany "meaningfully interruptive" when petitioners had remained in United States far beyond expiration of six week visitor visa). As in *Heitland*, petitioner used "implicitly deceptive methods to secure re-entry in the United States," 551 F.2d at 503. The ameliorative goals of *Fleuti* do not extend to those who engage in actions that are contrary to the "policy reflected in our immigration laws." *Fleuti*, 374 U.S. at 462, 83 S.Ct. at 1812.

b. In relying on what she terms the "diminished hardship" factor, respondent fails to explain how this factor is distinguishable from the "extreme hardship" factor that Congress explicitly incorporated into the statute. See our opening brief (at 25-28). Moreover, respondent does not suggest a single example of a situation in which, upon application of the "diminished hardship" test, a deportable alien who has been in the United States for more than seven

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[5]Respondent's claim (Resp. Br. 21) that the purpose of her trip was to visit her sick mother is unsupported by the record.

years would be able to satisfy the "extreme hardship" requirement but not the "continuous physical presence" requirement (see Resp. Br. 19). Thus, under the "hardship" test adopted by the court of appeals and advocated by respondent, the length of an alien's absence during the seven year period is essentially irrelevant so long as the alien is able to establish "extreme hardship." This is a result that Congress clearly could not have intended. Accordingly, respondent's three month trip to Thailand is not rendered any less meaningfully interruptive of her "continuous physical presence" in this country because she did not take up employment, establish a household, or acquire property abroad.

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

SEPTEMBER 1983

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No. 82-91

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner

v.

PADUNGSRI PHINPATHYA,
Respondent

On Writ or Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF AMICUS CURIAE OF AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

By: JAMES J. ORLOW, ESQ.
936 Public Ledger Building
Sixth and Chestnut Streets
Philadelphia, PA 19106
(215) 922-1181

Of Counsel:
LAWRENCE H. RUDNICK, ESQ.
WASSERMAN, ORLOW & RUBIN
936 Public Ledger Building
Sixth and Chestnut Streets
Philadelphia, PA 19106

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

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IN THE SUPREME COURT OF
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October Term, 1982

IMMIGRATION AND NATURALIZATION SERVICE,
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Respondent

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTERESTS OF THE AMICUS CURIAE

The American Immigration Lawyers Association is a non-profit association of lawyers practicing immigration, nationality and citizenship law. The Association is supported by the dues paid by its members and is dedicated to the just administration of the immigrations laws of the United States. The Association and its members are committed to the development of the jurisprudence of immigration law and believe that the views submitted herein while nevertheless in support of the alien's position would present a different view from that which might be advanced by either party.

SUMMARY OF ARGUMENT

The issue on which this Court accepted for review had become moot during the pendency of the appellate process while at the Court of Appeals. This Court lacks jurisdiction over the issue presented in that there is no longer a lively dispute to present a "case or controversy". Judicial economy and the constitutional rule against advisory opinions requires that the issue before the Court be found to be moot.

I

Whether the Respondent has Accrued the Necessary Seven Years of Physical Presence Required by 8 U.S.C. §1254(a)(1) has Become Moot during the Appellate Process.

It is axiomatic that a case must present a "case or controversy" at all stages of appellate review to be reviewable by this Court. See *U.S. v. Munsingwear*, 340 U.S. 36 (1950). It is now clear that the doctrine of mootness addresses both constitutional concerns and jurisprudential limits. See Laurence H. Tribe, Constitutional Law (1978), §3-14, pages 62-68. This case is moot in both the constitutional sense and review would not be a sound exercise of judicial discretion.

A brief recitation of the agreed facts reveals the mootness of the underlying issue. On or about October 11, 1969 the Respondent Entered the United States at Honolulu, Hawaii. In January of 1974 she departed with her two children to Thailand to visit her mother. She and the children returned to the United States three months later in April of 1974, (J.A. 17-18). She has not departed the United States since that date. These facts are not controverted and are recited in the brief of the Immigration and Naturalization Service, at pages 3-4.

Deportation proceedings were commenced against the Respondent in 1977. Both the Immigration Judge

and the Board of Immigration Appeals found the Respondent to be deportable. Both found, *inter alia*, that she did not have the required seven years of continuous physical presence as set forth in 8 U.S.C. §1254(a)(1). A Petition for Review was filed with the United States Court of Appeals of the Ninth Circuit which reversed the Board of Immigration Appeals as to this issue and as to the issues of good moral character and extreme hardship. (J.A. 1a-13a).

Although the Immigration Service was not in agreement with the rulings on good moral character and extreme hardship, they did not seek certiorari on either of these issues. The only issue on which certiorari was sought and granted is that involving the continuous physical presence requirement.

It is readily apparent, even assuming that the Respondent's departure in 1974 was meaningful interruptive of the seven year physical presence requirement, that she has accrued more than seven years since that time. In fact, she has now accrued nearly nine years of continuous physical presence, which is not in dispute.

A case presents on Article III "case or controversy" only when there continues to be a lively dispute between the parties. There need be a continuing threat of adverse consequences to one of the parties or a significant prospect of future harm. See *Powell v. McCormick*, 495 U.S. 486 at 496 (1962) as well as *Hall v. Beals*, 396 U.S. 45 (1969) and *SEC v. Medical Committee on Human Rights*, 404 U.S. 403 (1972).

The Immigration Service's request for this Court to review this issue runs a foul of this Court's analysis in *County of Los Angeles v. Davis*, 440 U.S. 625 (1979). This case sets up a two part test for analyzing whether an issue has become moot on appeal. First, is there any reasonable expectation that alleged wrong will recur. It is clear that this issue will not recur unless the Respondent departed the United States.

Secondly, whether interim relief has completely and irrevocably resolved the controversy. In this regard this case is much like that of *DeFunis v. Odegaard*, 416 U.S. 312 (1974) where the passage of time rendered the issue moot.

In summary, it is apparent that there is no longer a case or controversy before this Court. Respondent has now plainly accrued the seven years required for statutory eligibility.

It is important to note that none of the exceptions to the mootness rule are applicable herein. In particular, the exception relating to "controversies that are capable of repetition yet evading review" would not apply. See *Moore v. Ogilvie*, 394 U.S. 814 (1969) and *Roe v. Wade*, 410 U.S. 113 (1973). The issue of whether seven years has accrued is by definition one that could allow for full appellate review including this Court while a lively issue continued to be presented by the litigants. This is in contrast to the relatively short periods of time involved in *Moore v. Ogilvie* and *Roe v. Wade*.

From a jurisprudential viewpoint, this case is not appropriate for review. This Court has long refused to entertain hypothetical questions for reasons of sound judicial economy. The issue herein presented need not be decided on this record. The difficult issue presented can be left for another day to be considered upon a record that fully and necessarily presents the issue. This Court should not reach out to decide an important issue of federal statutory construction without the need to do so.

This reasoning was no less applicable when the United States Court of Appeals for the Ninth Circuit heard oral argument on May 6, 1981 or entered its judgment on October 1, 1981. For these reasons so much of its opinion as dealt with interpretation of the "continuous physical presence" rule was beyond that Court's jurisdiction at that time. This Court has supervisory jurisdiction to instruct the Ninth Circuit under the provisions of Rule 17.1 of the Rules of the Supreme Court insofar

as the Court below departed from the usual and accepted course of judicial proceedings by deciding an issue then already moot.

Amicus respectfully suggests, therefore, that so much of the Court of Appeals' decision below as dealt with "continuous physical presence" and "meaningful interruption" be reversed as moot when decided.

CONCLUSION

The issue on which the Court has granted certiorari has become moot during the appellate process. This Court should decline to review the question presented on its merits for constitutional and jurisprudential reasons.

Respectfully submitted,

By: James J. Orlow, Esq.
936 Public Ledger Building
Sixth and Chestnut Streets
Philadelphia, PA 19106
(215) 922-1181

Of Counsel:
LAWRENCE H. RUDNICK, ESQ.
WASSERMAN, ORLOW & RUBIN
936 Public Ledger Building
Sixth and Chestnut Streets
Philadelphia, PA 19106
(215) 922-1181
Date:

No. 82-91-CFX
Status: GRANTED

Title: Immigration and Naturalization Service, Petitioner
v.
Padungsri Phinpathya

Docketed:
July 16, 1982

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Greenberg, Bert D.

Entry	Date	Note	Proceedings and Orders
1	Jun 25 1982		Application for extension of time to file petition and order granting same until July 16, 1982 (Rehnquist, June 29, 1982).
2	Jul 16 1982	G	Petition for writ of certiorari filed.
3	Aug 18 1982		DISTRIBUTED. September 27, 1982
4	Aug 31 1982	P	Response requested. (Due September 30, 1982 - NONE RECEIVED)
5	Oct 4 1982		Brief of respondent Padungsri Phinpathya in opposition filed.
6	Oct 6 1982		DISTRIBUTED. October 29, 1982
7	Oct 19 1982	X	Reply brief of petitioner filed.
8	Nov 1 1982		Petition GRANTED.
			**********
10	Dec 15 1982		Order extending time to file brief of petitioner on the merits until January 14, 1983.
11	Jan 14 1983		Joint appendix filed.
12	Jan 14 1983		Brief of petitioner Immigration and Naturalization Service filed.
13	Feb 18 1983		Record filed.
14	Feb 18 1983		Certified original record & C.A. proceedings received.
16	Feb 16 1983		Order extending time to file brief of respondent on the merits until March 23, 1983.
17	Mar 17 1983	D	Motion of respondent to enlarge record, suggestion of mootness and motion to stay further proceedings pending administrative action filed.
18	Mar 24 1983		Brief amicus curiae of Immigration Lawyers Assn. filed.
19	Mar 23 1983		DISTRIBUTED. April 15, 1983. (Motion of respondent to enlarge record, etc.)
20	Mar 25 1983		Brief of respondent Padungsri Phinpathya filed.
21	Apr 18 1983		Motion of respondent to enlarge record, suggestion of mootness and motion to stay further proceedings pending administrative action DENIED.
22	Jul 8 1983		CIRCULATED.
23	Aug 15 1983		SET FOR ARGUMENT. Monday, October 3, 1983. (1st case)
24	Sep 15 1983		Reply brief of petitioner Imm. and Nat. Service filed.
25	Oct 3 1983		ARGUED.